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REPORTS

OF

CASES AT LAW AND IN CHANCERY

ARGUED AND DETERMINED IN THE

SUPREME COURT OF ILLINOIS.

NORMAN L. FREEMAN,
REPORTER.

VOLUME 134.

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN MARCH, APRIL,
JUNE, OCTOBER AND NOVEMBER, 1890, AND SOME CASES IN
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AT THE OCTOBER AND NOVEMBER TERMS,
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JUSTICES OF THE SUPREME COURT

DURING THE TIME OF THESE REPORTS.

SIMEON P. SHOPE, CHIEF JUSTICE.*

JOHN SCHOLFIELD, CHIEF JUSTICE.*

JOHN SCHOLFIELD,	}	JUSTICES.
BENJAMIN D. MAGRUDER,		
JOSEPH M. BAILEY,		
DAVID J. BAKER,		
JACOB W. WILKIN,		
ALFRED M. CRAIG,		
SIMEON P. SHOPE,		

ATTORNEY GENERAL,
GEORGE HUNT.

REPORTER,
NORMAN L. FREEMAN.

CLERK IN THE SOUTHERN GRAND DIVISION,
J. O. CHANCE, Mt. Vernon.
FRANK W. HAVILL,† Mt. Vernon.

CLERK IN THE CENTRAL GRAND DIVISION,
ETHAN A. SNIVELY, Springfield.

CLERK IN THE NORTHERN GRAND DIVISION,
ALFRED H. TAYLOR, Ottawa.

*Mr. JUSTICE SCHOLFIELD became Chief Justice at the June Term, 1890.

†At a general election held on the 4th day of November, 1890, Frank W. Havill was elected clerk in the Southern Grand Division, for the full term of six years. And on the same day Ethan A. Snively and Alfred H. Taylor were re-elected to that office in the Central and Northern Grand Divisions, respectively, each for the full term of six years.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF ILLINOIS.

THE CHICAGO, PEORIA AND ST. LOUIS RAILWAY COMPANY

v.

JAMES ALDRICH.

Filed at Mt. Vernon June 13, 1890.

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1. *EMINENT DOMAIN—jurors in condemnation proceedings—right of challenge in vacation—and of the grounds of challenge—presumption.* The statute gives the parties to a proceeding to condemn land in vacation, the same right of challenge of jurors as in other civil cases in the circuit court. Under this statute, a ground of challenge in a civil case in a court of record is good in a condemnation proceeding.

2. It is a sufficient cause of challenge that a juror called, if not a member of the regular panel, has served as a juror in the trial of any cause in any court of record in the county within one year previous to being called.

3. Where the court sustains a challenge to a juror on the ground of his service on a jury in a court of record within a year previous to his being called, it will, in favor of the ruling, be presumed that he was not a member of the regular panel, but a juror to whom the cause of challenge would apply.

4. In a case where the bill of exceptions does not purport to contain all the evidence heard as to the qualification of jurors, and a general challenge is allowed, not specifically limited to the particular ground disclosed by the bill of exceptions, it will be presumed, if the particular ground is not shown, the challenge was sustained on other grounds.

Syllabus.

5. *SAME—jury fees—whether taxable against the county.* In a proceeding to condemn land, and after judgment, the petitioner entered a motion to strike the jury fees from the fee book, for the reason that the county should pay such fees, which motion was overruled. There was nothing in the record to show that such fees were charged to the petitioner, or that any judgment for costs was rendered against it: *Held*, that no assignment of errors could be entertained on the record.

6. *SAME—measure of damages—as to land not taken—what elements to be considered—of benefits.* In estimating the damage to that part of a farm not taken for a railway track and right of way, the jury may take into consideration such incidental injury as will result from the perpetual use of the track for moving trains, or from danger of killing stock or injury to pasturing stock, and the danger of the escape of fire, and such other damages as are reasonably probable to ensue from the construction and operation of the proposed railroad.

7. It is proper for the jury to consider whether the land owner's stock will be liable to be killed, and his farm injured, or his fences and buildings destroyed by fire. If there is a liability to such injury, its tendency is to depreciate the value of the farm and its use, as well as in the market; and such liability to injury may be regarded as proximate damages, as much as the danger and inconvenience of crossing the road from one part of the farm to another.

8. In estimating the damages to land not taken, the jury should not consider any general benefits which the railroad may occasion in making a better market, or by affording conveniences for travel. They should not take into consideration such benefits as the land owner will enjoy in common with the owners of other lands through which the road runs, but only such as result to him over and above such common benefits.

9. In a proceeding for the condemnation of a right of way for a railroad, and the assessment of damages to the part of the land not taken, the court instructed the jury, that in estimating the damages to the land not taken, they should consider the railroad as running only through the defendant's farm, and should not consider any general benefits which the road might occasion by making a better market, or by affording conveniences for travel, etc.: *Held*, that there was no error in the instruction.

10. *SAME—practice—limiting number of witnesses.* Even if the court, in a condemnation proceeding, has the power, in its discretion, to limit the number of witnesses who shall be examined, or to limit the number of witnesses whose fees and costs shall be taxed against the petitioner, it can not be said that the failure to exercise that discretion is of itself an abuse of discretion which may be reviewed.

Brief for the Appellant.

11. Three cases for the condemnation of land for a railroad right of way were tried together. After judgment, the petitioner moved the court to tax the fees and costs of all the defendants' witnesses in excess of six, against the defendants. It did not appear that more witnesses were examined than were fairly and reasonably necessary. Moreover, under such circumstances there is no rule of law which made it imperative upon the court to tax the fees and costs of any of the witnesses to the defendants.

12. PRESUMPTION—in support of judgment. On appeal or error, every reasonable intendment not negated by the record, which goes to support the judgment, must prevail.

APPEAL from the County Court of Madison county; the Hon. CYRUS L. COOK, Judge, presiding.

MESSRS. MORRISON & WHITLOCK, and MESSRS. DALE & BRADSHAW, for the appellant:

The challenged jurors were on the regular panel, and the challenge was not applicable, but applies only to jurors picked up to fill the panel. Rev. Stat. chap. 78, sec. 14.

The third instruction given for defendant was erroneous, and should have been refused. After calling the attention of the jury to the rule for estimating damages to lands not taken by reason of the location and construction of the road, with several other "elements," it proceeds: "The danger, if any, by fire from passing engines, or otherwise, and liability, if any, of having the stock running on said farm killed or injured by trains, together with any other damage naturally resulting from the construction of the road." This instruction is in conflict with the opinion rendered in *McReynolds v. Baltimore and Ohio Railroad Co.* 106 Ill. 152.

Damages from fire and the killing of stock are classed among the imaginary damages, and if any occur the road is liable. *Jones v. Railroad Co.* 68 Ill. 380; *Railroad Co. v. Brake*, 125 id. 396.

The fourth instruction is objectionable. It, in effect, tells the jury, that in considering the question of injury to the lands

Brief for the Appellee. Opinion of the Court.

of Aldrich not taken, they should consider this railroad as running only through "this farm." By this instruction the jury are directed, in effect, to consider this a railroad only running through the tract of land described, and with trains of cars running back and forth for all time, as the stereotyped expressions of the witnesses have it. It might have been well to instruct the jury that they were not authorized by law to deduct anything from the damages to contiguous lands for benefits that were common to others; but was it right to include in it this expression?

As to the right to limit the witnesses or the costs of the witnesses, see Rev. Stat. chap. 33, sec. 15; *White v. Herman*, 51 Ill. 243.

It was error to tax the jury fees against petitioner. Rev. Stat. chap. 78, sec. 44.

Messrs. HAPPY & TRAVOUS, for the appellee:

The jury in this case, instead of being of the regular panel, was a special jury called for a special purpose.

Appellee's third instruction is based on the ruling of this court, and is in accord with it. *Railroad Co. v. Bowman*, 122 Ill. 595; *Railroad Co. v. Brake*, 125 id. 395.

There was no error in refusing to limit the witnesses, or refusing the motion to tax the jury fees to the county.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a petition under the Eminent Domain Law, brought by the Chicago, Peoria and St. Louis Railway Company against James Aldrich and two others, to condemn a right of way, one hundred feet in width, over lands belonging to the defendants. The petition was presented to the judge of the County Court of Madison county and the proceedings thereon were had in vacation. Defendant Aldrich filed a cross-petition claiming and praying for an assessment of damages

Opinion of the Court.

to that portion of his land not taken for said right of way. By consent of the parties, the trial was had as to the several tracts of land of the three defendants at the same time and before the same jury, and the jury having been empannelled and sworn, and having heard the evidence adduced by the respective parties, and having made personal examination of the premises in charge of the sheriff, rendered separate verdicts as to each tract of land. By their verdict in the case of defendant Aldrich the jury assessed as compensation for the land taken for right of way the sum of \$116, and as damages to the contiguous land not taken the sum of \$650, making \$766 in all, and the court, after denying the petitioner's motion for a new trial, rendered judgment in accordance with the verdict. The petitioner now appeals to this court.

The first error assigned calls in question the decision of the court sustaining the defendant's challenge of James Stubbs and John Keinlen, two jurors who had been accepted by the petitioner.

It appears that said Stubbs, being called as a juror, and having testified on his examination that he resided at Edwardsville, was a freeholder, knew the defendant, and had no opinion about the merits of the case, he was accepted by the petitioner as a juror. The defendant's counsel then asked him if he had served on a jury in a court of record within one year, and he replied that he had served on one jury in an insane case in the County Court within a year, but on no other jury, and thereupon the defendant challenged said juror for cause, and said challenge was sustained by the court.

Said Keinlen also having answered that he was a freeholder and resided at Edwardsville; that he knew the defendant but had no opinion about the merits of the case, was accepted by the petitioner. Said juror being then asked whether he had served as a juror in a court of record within a year, answered that he had served on a jury in the Circuit Court one week as a picked up juror, and he was also challenged by the de-

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fendant for cause, and said challenge was in like manner sustained.

Although the mode of selecting the panel of jurors for service in condemnation cases, where such cases are fixed for hearing in vacation, is essentially different from that by which jurors are selected for service in the Circuit Court, the seventh section of the Eminent Domain Act gives to all parties in interest "the same right of challenge of jurors as in other civil cases in the Circuit Courts." This provision would seem to render the same grounds of challenge which the law gives in ordinary civil cases available in the trial of condemnation suits; and by the fourteenth section of the statute in relation to jurors, it is made a sufficient cause of challenge that the juror called, if not a member of the regular panel, has served as a juror in the trial of a cause in any court of record in the county within one year previous to being offered as a juror.

In this case it does not appear from the bill of exceptions whether the jurors to whom the challenge was sustained were members of the regular panel or not. On that point the record is silent. It will therefore be presumed, in support of the judgment of the court below, that they were not members of the regular panel, but were jurors to whom the particular cause of challenge shown would apply.

Furthermore, the bill of exceptions does not purport to contain all the evidence heard by the court in relation to the qualifications of said jurors, and the challenge for cause being general, and not specifically limited to the particular ground disclosed by the bill of exceptions, we can not say that other grounds of challenge may not have been shown sufficient to warrant the rejection of said jurors. Every reasonable intentment not negatived by the record, which goes to support the judgment, must prevail, and as the contrary is not shown, we must presume that all facts necessary to justify the court in sustaining the challenges were proved.

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Complaint is made of the third instruction given to the jury at the instance of defendant Aldrich. That instruction held, that the jury, in estimating the damages to that part of said defendant's farm not taken by the petitioner for right of way, should consider as elements of damage, among various other things, "the danger, if any, by fire from passing engines or otherwise, and liability, if any, of having the stock running on said farm killed or injured by trains, together with any other damage naturally resulting from the construction of said railroad." It is urged that the elements of damage here specifically named are too remote and speculative, and should not therefore have been submitted to the jury.

So far at least as these objections are concerned, the instruction is fully justified by repeated decisions of this court. Thus, in *C., B. & N. R. R. Co. v. Bowman*, 122 Ill. 595, we held that the jury, in estimating the damages to the land not taken would be justified in considering "such incidental injury as would result from the perpetual use of the track for moving trains, or from danger of killing stock, or injury to pasturing stock, or escape of fire, and generally for such damages as are reasonably probable to ensue from the construction and operation of the proposed road." In *St. L. & S. E. Ry. Co. v. Teters*, 68 Ill. 144, we said: "The design of the law is, to fully compensate a party for all injury he may sustain by reason of the appropriation of his land for the use of the road, and which shall grow out of or be occasioned by its location and use at that place. This being true, it follows that it is proper for the jury to consider whether his stock would be liable to be killed and his farm injured, or his fences and buildings destroyed by fire, and the amount of damage he would thus sustain. If there was a liability to such injury, its tendency would be to depreciate the value of the farm in its use, as well as in the market; and if so, such would be proximate damage, as much as the danger and inconvenience of crossing the road from one part of the farm to another." See also,

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R., R. I. & St. L. R. R. Co. v. McKinley, 64 Ill. 338; *McReynolds v. B. & O. R. Ry. Co.* 106 id. 152; *C. & I. R. R. Co. v. Hopkins*, 90 id. 316; Lewis on Eminent Domain, sec. 497, and authorities cited in notes.

Objection is also made to the defendant's fifth instruction which told the jury that, in estimating the damages to the defendant's land not taken, they should consider the railroad as running only through his farm, and should not consider any general benefits which the road might occasion by making a better market, or by affording conveniences for travel; that it would not be proper for the jury to take into consideration such benefits as the defendant might enjoy in common with the owners of other lands through which the road might run, but only such as would result to the defendant over and above such common benefits.

The rule laid down by this instruction that general benefits which the defendant will enjoy in common with other land-owners, or with the public, should not be taken into account is not questioned, but fault is found with the direction to the jury to consider the railroad as though it only ran through the defendant's farm. We can not see how this direction, when taken in connection with the residue of the instruction and the proposition of law intended to be stated and illustrated, could have been in any degree prejudicial to the railroad company. So long as the benefits which the defendant will share with the public were to be excluded, it was by no means illogical to view the railroad, so far as the question of damages to the defendant's farm was concerned, as a structure local and limited to said farm. The general benefits arising from the construction and operation of the road, and which the defendant will share in common with others, will grow out of the fact that the road is not limited in its extent to one locality, but is to connect and form a commercial highway between points distant from each other. The instruction to the jury to consider the road only as running through the defendant's farm

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was manifestly given for the purpose of eliminating from their minds all consideration of those general or commercial advantages which will flow to the public from the construction of the road, but which should in no way influence the assessment of damages. The suggestion that the jury were likely to be misled into the supposition that they were to assess damages upon the theory that engines and trains of cars were to be continually passing to and fro over said farm is far-fetched and improbable.

The petitioner, after judgment had been rendered, entered his motion to tax the fees and costs of all the defendant's witnesses in excess of six, against the defendant, claiming that, during the trial, and after the defendant had produced and examined six witnesses, it notified the defendant, in the presence of the court, that at the proper time it would make such motion. We fail to find any evidence in the record that such notice was given, nor does it seem to us to be of any importance whether it was given or not. Even if it should be conceded that the court had the power, in its discretion, to limit the number of witnesses who should be examined, or to limit the number of witnesses whose fees and costs should be taxed against the railroad company, it can not be said, at least under the circumstances of this case, that its failure to exercise such discretion was of itself an abuse of discretion. It should be remembered that three cases were being tried together, and it seems that only fifteen witnesses were produced and examined on the part of the defendants. We can not say that more were examined than were fairly and reasonably necessary, and under these circumstances there is no rule of law known to us which made it imperative upon the court to tax the fees and costs of any of these witnesses to the defendants.

After the entry of judgment, the petitioner moved the court, "to strike the jury fees in this proceeding from the fee book as entered by the clerk of this court, for the reason that Madi-

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son county should pay said fees, and that the petitioner is not legally liable for the same." This motion was overruled, and the decision of the court overruling the same is assigned for error.

There is nothing in the present record which makes it necessary for us to determine whether the jurors' fees should have been taxed against the petitioner or against the county. There is nothing in the record showing that they were in fact taxed against the petitioner, and accordingly, so far as appears, the petitioner has no ground of complaint. The fee bill is not in the record, nor does it even appear that any judgment for costs was rendered against the petitioner or any one else. The judgment merely orders that the petitioner pay to the defendant the amount of the damages awarded by the jury, and provides that, upon payment of that sum, it may enter upon the right of way condemned, but, so far as we are able to see, no disposition whatever is made of the question of costs. All there is in the record on that subject is the petitioner's motion and the decision of the court overruling it, but it can not be inferred from those documents that the court taxed against the petitioner either the jurors' fees or any other item of costs. So far as appears, the motion to re-tax may have been denied for the plainly sufficient reason that no costs had been taxed against the petitioner. It is clear therefore that the last mentioned assignment of error can not be sustained.

As we are able to find no error in the record the judgment of the County Court will be affirmed.

Judgment affirmed.

In re FRANCES S. MAJOR, Executrix.*Filed at Springfield June 12, 1890.*

1. **TAXATION—mining right separate from the land—to be listed separately.** Where there is a grant of mineral land, with a reservation of the mining right to the grantor, this will amount to a separation of the rights of property as between the land and mines or mining rights, and each must be listed separately for taxation.

2. Where the ownership of coal is severed from the ownership of the soil, the fee in the coal is property, and, as such, is liable to its just share of taxation.

3. **SAME—exemption—over-assessment—remedies.** On an appeal from the decision of the board of supervisors refusing to abate the taxes on property on the ground of its not being liable to taxation, the regularity of the assessment can not be questioned. A different remedy is provided where the property is assessed too high.

This is an original suit in this court, and arises upon the application of the Auditor to have the action of the board of supervisors affirmed in holding certain mining privileges and rights taxable.

Mr. B. S. PRETTYMAN, and Mr. R. A. WALLACE, for the applicant.

Mr. GEORGE HUNT, Attorney General, for the People.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This is an appeal from the decision of the board of supervisors of Livingston county, refusing to abate certain taxes upon the application of Frances S. Major, executrix and trustee under the last will of Lot C. Clark, deceased, and is brought to this court upon the certificate of the Auditor, in conformity with the provisions of section 97 of the Revenue law.

Said Clark died seized in fee of section 4, and also of the north-west quarter, and west half of the south-west quarter, of

134	19
135	551
184	19
160	601
134	19
176	283
184	19
194	1 26
194	2 27
184	19
218	1286

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section 9, all in township 26, range 6, in said county. Prior to May 1, 1888, appellant sold and conveyed to other parties all of said lands except the north-west quarter of section 4, and $84\frac{41}{100}$ acres in the south-west quarter of said section, and sold and contracted to convey the residue of said lands. In the several deeds and contracts for conveyance she expressly reserved the coal, and the right to mine the same, under the whole of said lands. In making the assessment for the year 1888, the assessor assessed the lands to the purchasers thereof, and also assessed to appellant the fee in the coal under said lands, placing the valuation of that under section 4 at \$1000, and of that under the north-west quarter and west half of the south-west quarter of section 9 at \$400. At the July meeting of the board of supervisors, appellant presented her petition, under oath, alleging that said assessment was unlawful, and objecting to the same. The grounds of her objections were as follows:

First, that there is no coal or other mine upon said premises so assessed; second, that there is no evidence that coal underlies said premises so assessed; third, that the whole of said premises have already been assessed by said assessor for the year 1888, regardless of any reservation, and at the same value that like land in the same neighborhood is assessed for said year 1888; fourth, that the supposed fee in coal so assessed is remote, invisible and intangible, and not a subject matter of taxation; fifth, that there is no law of this State authorizing the taxation of a fee in coal supposed to underlie a tract of land, when there is no coal or other mine opened on said land, and no evidence that coal exists thereunder; sixth, that there is no law of this State authorizing the taxation of a fee in coal underlying a tract of land, unless there is a coal or other mine upon it; and seventh, that there is no basis upon which said assessment could be properly made,—it was merely guess-work on the part of the assessor.

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It was stated in her sworn petition, "that there is no coal or other mines open or in operation or upon said premises, or any part thereof, nor has she given the right to remove any coal, if any there be, to any other mine or person; that the coal, if any there may underlie said lands, belongs to the estate of Lot C. Clark." Said petition further stated that the assessor "has also assessed each and every parcel of the premises above mentioned, except the railroad right of way, regardless of any reservation of coal, minerals, gases or oils of any kind, and at the valuation as like lands in the same locality are assessed, as she is informed and believes." She also filed the affidavit of one Weaver, to the effect that there was no coal or other mine open or upon said lands.

The affidavit of Conn, the assessor, was filed in opposition, showing that he assessed the lands sold by appellant as trustee, lower than he would otherwise have done if said coal, etc., had not been reserved, "and that he assessed the fee of the coal so reserved at what he thought it should be assessed, so that the sum so assessed on the land to the owners that did not own the coal, and the coal so assessed, put together, would make the assessment of the coal and land at what other land of the same kind and worth would be assessed at." He also stated therein that "there is a coal mine on the land formerly comprising said estate, and that it was formerly worked and considerable coal taken out, and of a good quality, and he believed there was plenty of coal under said land accessible by said mine."

This appeal being taken under the third clause of section 97 of the Revenue act, the only question before us for decision is that of the liability to or exemption of the property in question from taxation. In respect of the questions of the correctness or regularity of the assessment we have no concern.

Section 1 of article 9 of the constitution of 1870 enacts, that "the General Assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person

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or corporation shall pay a tax in proportion to his, her or its property." We think it clear that the mining right, and right to the coal and minerals reserved in the deeds and contracts, must be regarded as property, within the meaning of the foregoing provision. Such mining rights are recognized as property by section 7, chapter 94, of the Revised Statutes, which declares, that "when the owner of any land shall convey, by deed or lease, any mining right therein, such conveyance shall be considered as so separating such right from the land that the same shall be taxed separately, and any sale of the land for any tax or assessment shall not include or affect such mining right." By the 6th section of the same act such mining rights may be conveyed by deed or lease, etc., with like effect as deeds and leases of real estate. It follows as a corollary from this statute, that when the grant is of the land, with a reservation of the mining right to the grantor, there is a like separation of the rights of the property as between the land and mines or mining rights, and each must be separately listed for taxation.

It is, however, said, that the question is not as to the right to assess and tax coal in land which is reserved and held separate from the fee of the surface, but the question is as to the existence of the coal assessed, and it is urged that there is no coal mine open or in operation upon said land, and no evidence that coal exists thereunder, and therefore the assessor was not authorized to make the assessment. It is alleged in the petition, and is otherwise manifest, that whatever there was of coal or minerals underlying said land was reserved, and continued to be the property of appellant, with the right to mine the same. It can not be material, here, whether this right was of great or little value. If it was property, it was the duty of the assessor to return an assessment thereof. If valued too high, another mode is pointed out for redress, to which appellant might have resorted. The ownership of the coal was severed from the ownership of the soil, and the fee

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of the coal was property, and, as such, was liable for its just portion of taxation.

It is a sufficient answer to the contention that the assessment was invalid because the fee to the coal on section 4 was assessed as a single tract at \$1000, and the fee to that on section 9 (also as a single tract) at \$400, instead of assessing the same in separate lots or tracts, according to the manner in which the lands had been sold, that that question is not presented to us upon this appeal. That contention relates to the regularity of the assessment, which can not be questioned in this proceeding. It should, however, be remarked, that we do not intend by what has been said, to imply that the assessment would be held void, in a proper proceeding, for that reason. It is also to be observed, that here the ownership of the mining right upon or under all the lands was in the same person, in the same right, and the assessment was made of all contiguous and adjoining rights as a single tract. In the cases to which our attention has been called by counsel,—*Howe v. People*, 86 Ill. 289, *Lyman v. People*, 2 Ill. App. 289, and *Hamilton v. City of Fond du Lac*, 25 Wis. 490,—there was a single assessment of tracts belonging to two or more persons, and the assessment was held to be void for that reason. But no such question is presented by this record. Here, as before shown, the property assessed belonged in its entirety to appellant, and in the same right.

The order of the board of supervisors holding that the property of appellant was liable to assessment and taxation, is affirmed.

Order affirmed.

MEREDITH L. SMITH

v.

GEORGE H. HUNTOON *et al.**Filed at Springfield June 12, 1890.*

1. SALE ON EXECUTION—*plaintiff as the purchaser—chargeable with notice of irregularities.* Where the judgment creditor becomes the purchaser of property, he will be chargeable with notice of all irregularities in the proceedings.

2. SAME—*assignee of such purchaser—also chargeable with notice.* Where the plaintiff in a judgment becomes the purchaser of land, and assigns his certificate of purchase, the assignee will occupy the same position as the assignor did before the transfer. The rule that applies to strangers purchasing at judicial sales, or to a purchaser in good faith and for value from one who has acquired title under a judicial sale, can have no application to such assignee.

3. A voluntary assignee of a certificate of purchase, purchasing from the plaintiff in the execution, and paying only the amount of his bid, stands in the shoes of his assignor and succeeds to all his rights, but to none other, and the certificate in his hands will be chargeable with all the infirmities which existed against it in the hands of the assignor.

4. SAME—*sale of lands en masse.* A sale of land *en masse*, on execution, when it is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular. When a needless sacrifice of the debtor's property is made, that circumstance, with inadequacy of price, affords ground for equitable relief.

5. SAME—*inadequacy of price.* Although gross inadequacy of price alone will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition.

6. ATTACHMENT—*notice to debtor— inquiry to find residence.* The statute contemplates that if the residence of the defendant in attachment is not known, diligent inquiry shall be made to ascertain the same. If such inquiry is not made when it might be available, it will amount to a fraud on the debtor, especially when his property is attached and sold without notice to him.

APPEAL from the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Statement of the case.

This bill was filed in the Morgan circuit court, by Meredith L. Smith, against George H. Huntoon, Isaac L. Morrison and Herbert G. Whitlock, for the purpose of setting aside the sale of an undivided one-fifth interest in a tract of land containing one hundred and sixty acres, and the sheriff's deed made thereunder. The bill alleges complainant was the owner, on the 10th day of August, 1885, in fee, of the undivided one-fifth part of the one hundred and sixty acres, describing it; that on that day said Huntoon sued out a writ of attachment against the estate of complainant, in the circuit court of Morgan county, which was levied upon said interest in said land; that said writ was issued on the affidavit of said Huntoon, attached and made a part of the bill, and in which it was stated that complainant was justly indebted in the sum of \$46.67, which was due and justly owing to said Huntoon for one suit of clothes sold him by said Huntoon, after allowing all just credits, etc.; that the affidavit further stated that complainant was "not a resident of the State of Illinois, but that the said Meredith L. Smith, as he is informed, now resides at Pueblo, Colorado." The bill avers, in substance, that complainant did not then reside at Pueblo, Colorado, but that his residence was then, and ever since has been, at Alamosa, Colorado. It further alleges that said Huntoon, by inquiry, could have ascertained complainant's residence; that he had or received no notice of the attachment proceeding until after the sale of his land and the time of redemption therefrom had expired; that judgment was obtained in said attachment proceeding for \$46.67 damages and \$14.50 costs; that special execution issued on the 24th of October, 1885, and the sheriff sold thereunder all the estate aforesaid *en masse*, and without offering to sell the same in smaller lots, parcels or subdivisions, to said Huntoon, plaintiff in said attachment proceeding, for said judgment and costs, aggregating \$71.65. It avers, also, that the interest of complainant in the land aforesaid was at the time of the sale worth the sum of \$1500; that after the sale,

Brief for the Appellant.

Morrison and Whitlock purchased, for the said sum of \$71.65, the certificate of sale issued by the sheriff to Huntoon at said sale, and that subsequently, on January 26, 1887, the sheriff made and delivered to Morrison and Whitlock, as the assignees of said certificate, a sheriff's deed for said premises. It further alleges that the said Huntoon, Morrison and Whitlock knew at the time of the sale that the interest sold was worth \$1500. The bill avers the sale was fraudulent in law, and void, for the reason that the affidavit was insufficient and irregular, and did not give the court jurisdiction, and because of the inadequacy of the price, and because of the sale *en masse* without first offering in smaller quantities, as appears by the sheriff's return attached to and made a part of the bill. It further alleges that complainant first learned of any of said proceedings on the 14th day of October, 1887, and that he did not know that he was indebted to said Huntoon, and that if there was any claim, it was barred by the Statute of Limitations before the commencement of the attachment suit. The bill alleges a tender of the amount paid by Morrison and Whitlock, together with six per cent interest thereon from the day of sale, but that they claimed to be the owners in fee, and are seeking to assert title thereto under such void sale. Complainant offers to pay whatever may be equitably due to Morrison and Whitlock, and asks that the deed may be set aside and declared void, and prays for general relief. A demurrer was interposed to the bill, and sustained, and the complainant prosecutes this appeal from the order dismissing the bill.

Mr. JOHN W. SPRINGER, for the appellant:

The court erred in sustaining the demurrer, because no notice was given appellant of the attachment suit, the levy or the sale. The affidavit for the writ must state the residence of the defendant, if known, and if not known, that upon diligent inquiry affiant has been unable to find the same. It can not be made merely upon information. *Rietz v. People*, 77 Ill. 518.

Brief for the Appellees.

The demurrer should not have been sustained, because the sheriff made an excessive levy, and entirely failed to offer a less interest or smaller tract separately. Rev. Stat. chap. 77, sec. 12; *Day v. Graham*, 1 Gilm. 435; *Graham v. Day*, 4 id. 389.

The price bid was so grossly inadequate as to amount to a palpable fraud. *Morris v. Robey*, 73 Ill. 462; *Stewart v. Croes*, 5 Gilm. 443; *McMullen v. Gable*, 47 Ill. 71; *Mixer v. Sibley*, 53 id. 75; *Cowen v. Underwood*, 16 id. 22; *Duncan v. Sanders*, 50 id. 475; *Ballance v. Loomiss*, 22 id. 82; *Comstock v. People*, 49 id. 160; *Thomas v. Hebenstreit*, 68 id. 115; *Dickerman v. Burgess*, 20 id. 267; *Garrett v. Moss*, id. 549; *Dutcher v. Leake*, 44 id. 398; *Sowards v. Pritchett*, 37 id. 521; *McLean County Bank v. Flagg*, 31 id. 290; *Mathison v. Prescott*, 86 id. 493; *Bradley v. Luce*, 99 id. 234; *Cassidy v. Cook*, id. 385; *Berry v. Lovi*, 107 id. 614; *Witherwax v. Riddle*, 121 id. 145; *Reed v. Peterson*, 91 id. 289.

Morrison and Whitlock are chargeable with notice of the value of the property sold, its situation, and of the legal rules bearing on the transaction, and are not innocent purchasers without notice. 1 Story's Eq. Jur. sec. 373, pp. 416, 443; id. secs. 188, 190, 277; *Morris v. Robey*, 73 Ill. 462.

Messrs. MORRISON & WHITLOCK, for the appellees :

The bill fails to show that Morrison and Whitlock had any notice of any irregularity in the sheriff's sale. This was necessary. *Hay v. Baugh*, 77 Ill. 504.

The appellant was guilty of *laches*. The sale was not void, but only voidable by proceedings in apt time. *Fairman v. Peck*, 87 Ill. 163.

The judgment was not void for the defect in the affidavit for the attachment. It was only error. The court having jurisdiction, the judgment can not be attacked in this collateral proceeding. *Booth v. Rees*, 26 Ill. 45; *Outlaw v. Davis*, 27 id. 473; *Bussett v. Bratton*, 86 id. 158.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court:

We are of the opinion that the court erred in sustaining the demurrer to the bill of complainant. If the certificate of purchase had remained in the hands of the judgment creditor, Huntoon, no question could have arisen but what he would have been chargeable with notice of the irregularities in making the sale of complainant's land alleged in the bill. It has been so repeatedly held, that where the judgment creditor becomes the purchaser he is chargeable with notice of all irregularities, that we do not deem it necessary to enter into a discussion of that question. *Stewart v. Croes*, 5 Gilm. 442; *Morris v. Robey*, 73 Ill. 462, and cases cited.

The bill alleges that the property sold was of the value of \$1500 at the time of the sale, and that it was sold *en masse* for \$71.65, without having been offered in smaller tracts. It is manifest that the interest of the complainant in a much smaller division of this one hundred and sixty acres of land would have been ample to satisfy the special execution. In *Stewart v. Croes*, *supra*, which was a like bill, the allegation was that the land was of the value of \$1000 at the time of the filing of the bill, and the court said: "Had there been an allegation that the land was worth \$1000 at the time of sale, instead of at the time of filing the bill, such allegation, in connection with the other statements in the bill, would have presented a clear case for the interposition of a court of equity, for it would never be allowable for an officer to sell, *en masse*, a tract of land worth \$1000, to satisfy an execution for less than \$30, when the tract was susceptible of division, and the sale of a small part would have satisfied the debt." See, also, *Day v. Graham*, 1 Gilm. 435; *Cowen v. Underwood*, 16 Ill. 22; *Ballance v. Loomis*, 22 id. 82; *Phelps v. Conover*, 25 id. 312; *Davis, Cory & Co. v. Chicago Dock Co.* 129 id. 180, and cases there cited.

We held in *Phelps v. Conover*, *supra*, that while the plaintiff in execution has a right to insist upon a sale for the satisfac-

Opinion of the Court.

tion of his debt, the debtor also has the right to demand that the sale shall be conducted according to law, and in such a manner as shall not needlessly sacrifice his property. A sale made, therefore, *en masse*, where the property is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular. The creditor may insist that his debt shall be paid, but where a needless sacrifice is made of the debtor's property, an unconscionable advantage is taken of the debtor, not warranted by law, "which circumstance," as said in *Morris v. Robey*, *supra*, "with gross inadequacy of price, are at least impliedly recognized as grounds of equitable relief in a number of cases," citing *McMullen v. Gable*, 47 Ill. 71, and *Mixer v. Sibley*, 53 id. 75.

Moreover, it is alleged that the affidavit for the attachment stated the residence of the defendant therein upon information, only, and that an untrue residence was given. It is required by the Attachment act that the affidavit for attachment shall state the residence of the defendant, "if known, and if not known, that upon diligent inquiry the affiant has not been able to ascertain the same." By section 22 of the act, the clerk is required to send a copy of the notice by mail, addressed to the defendant at the place of residence stated in the affidavit. We do not propose, now, to determine the effect of this last mentioned irregularity. It must be manifest, whatever the effect, that the affidavit was not in compliance with the statute, and that no copy of the notice published by the clerk would have reached the defendant at the place designated in the affidavit, and that the purpose of the statute in requiring the mailing of notice was defeated. The statute seems to contemplate, that if the residence is not known, diligent inquiry should be made to ascertain the same; and if it be true, as alleged in the bill, that Huntoon could have ascertained the same upon inquiry, it was his duty to do so. By the course pursued, gross fraud might be perpetrated upon a defendant, and his property unjustly subjected to sale without notice to him.

Opinion of the Court.

It is alleged that Huntoon and Morrison and Whitlock knew that the land was of the value of \$1500 at the time of the sale and of the transfer of the certificate of purchase. Without further noting the irregularities alleged in the bill, it must be said that those already mentioned, when taken in connection with the gross inadequacy of price, make a case such as would require an answer, at least on the part of Huntoon, were he still the real party in interest. Although gross inadequacy of price, alone, will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition. See *Davis, Cory & Co. v. Chicago Dock Co. supra*; *Hamilton v. Quimby*, 46 Ill. 90; *Comstock v. Purple*, 49 id. 158.

The point is relied upon, that Morrison and Whitlock are *bona fide* purchasers, and are to be protected as such, and that although the plaintiff in execution is chargeable with notice of irregularities in the proceedings, they are not so chargeable. It is said there is no allegation of notice to them of such irregularities. It is alleged that they had notice of the value of the land. It is not necessary for us here to determine the estate or interest which the holder of the certificate of purchase acquires by virtue of the sale and certificate. Whatever right Huntoon had, and no more, passed by the assignment to Morrison and Whitlock. They occupy the position that he occupied, and stand precisely where he stood. The rule that applies to strangers purchasing at judicial sales, or to a purchaser in good faith and for value from one who has acquired title under a judicial sale, can have no application to them. The policy of the rule which protects strangers is to encourage bidding at judicial sales, and prevent the loss of money by strangers who bid upon the faith of the correctness of judicial proceedings, and where there is little opportunity to inquire into their regularity or irregularity. Morrison and Whitlock are mere volunteers, who paid the amount of the bid to the

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plaintiff in execution, and took an assignment of his certificate. The rule which applies to the assignee of a certificate of purchase issued to a plaintiff in execution, is that which applies to the plaintiff in execution himself. A grantee is charged with notice of the deeds and documents through which he derails title. So, here, Morrison and Whitlock, when they purchased from Huntoon his inchoate right, must be presumed to have known the course of proceedings through which he proposed deriving title, and to have known what was shown by the public records in respect thereof. By looking at the return of the sheriff on the special execution mentioned, they would have seen that a one-fifth interest in one hundred and sixty acres of land, which it is alleged they knew was worth \$1500, had been sold for \$71.65, *en masse*, and without any portion of it having been offered in less quantity. By reference to the files in the case they would have observed a palpable non-compliance with the law, through which gross fraud might be perpetrated upon the defendant. They stand, as before said, in the shoes of Huntoon, and succeed to all his rights, but none other, and the certificate in their hands is charged with all the infirmities which existed against it while in the hands of Huntoon. *Reynolds v. Harris*, 14 Cal. 667; *Turner et ux. v. Bank*, 78 Ind. 19; *Ayres v. Campbell et al.* 9 Iowa, 213; *Herman on Executions*, 435.

The bill of appellant is inartificially drawn, and in many respects might well be amended, but we are of opinion it shows substantial grounds for equitable relief, and the decree dismissing the bill will be reversed and the cause remanded for further proceedings.

Decree reversed.

• WILLIAM ENNOR

v.

THOMAS H. HODSON.

Filed at Ottawa June 12, 1890.

1. TRUSTS AND TRUSTEES—*property given in trust—trust following the fund—right of cestui que trust to interfere.* A testatrix devised all her property to her husband, in trust for her daughter, and appointed the husband trustee for the daughter, "to act and transact all her affairs during his natural life." After the death of the testatrix, a note for some of the trust property was given to the daughter, and she indorsed and transferred the same to the trustee for collection, who brought suit thereon: *Held*, that the trustee was given the control of the property during his life, and that the daughter had no right to take the control of the property into her own hands, or to settle the suit brought by the trustee on the note.

2. Where property is devised to a trustee in trust for a married woman, to be managed by the trustee during his lifetime, she may have the aid of a court of equity to compel a faithful administration of the trust, and, under certain circumstances, to remove the trustee and appoint another in his stead. But she can neither dispose of the property devised in trust for her benefit, nor create a charge upon it, except in the manner and for the purpose specified in the devise.

3. In case a debt secured by mortgage on real estate is devised to a trustee in trust for the benefit of another, and on foreclosure other property is bought by the trustee in his own name, such other property will take the place of the debt, and be impressed with the same trust; and where such property is sold and conveyed, the consideration therefor will still be trust property, subject to the right of the trustee to manage and control.

4. A person devised her estate to her husband, in trust for their married daughter, to be managed by the trustee during his life. On the foreclosure of a mortgage so devised, the trustee purchased other property, taking a conveyance in his own name, which he afterward conveyed to the daughter. The daughter subsequently sold and conveyed the property, taking the note of the purchaser, which she indorsed, and transferred to the trustee: *Held*, that the trust attached to the note, and that the daughter had no right to receive payment of the note, or control the trustee in its collection. The *cestui que trust* was estopped, by her assignment of the note, to say that the note was not trust property.

Statement of the case.

5. *SAME—imposing restrictions—right of donor.* A testatrix has the right to limit her gift to a married daughter by such restrictions as she may see fit to impose, and a court of equity will not allow them to be set aside by either the voluntary act or the negligent omissions of the trustee appointed to enforce them.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Jo Daviess county; the Hon. JOSEPH M. BAILEY, Judge, presiding.

This was an action of assumpsit, by William Ennor, against Thomas H. Hodson, upon a promissory note of \$6000, dated September 18, 1882, payable to Alice Ennor, twelve months after date, without interest, if paid when due, and indorsed to William Ennor by Alice Ennor. The main defense set up was payment to Alice Ennor by the maker, he contending, that as she was the equitable owner, a settlement with and payment to her was a bar to the action.

The court, at the request of the defendant, instructed the jury, "that if they believe, from the evidence, that Alice Ennor is the owner of the note in question, and that said William Ennor holds the same as her agent, and so held such note as such agent, merely, and not in his own right, at the time the defendant paid said note to said Alice Ennor, if they believe, from the evidence, that the defendant did so pay the same to said Alice Ennor, as claimed by the defendant, then the jury should find the issues for the defendant,"—to which plaintiff excepted.

The jury found for the defendant, and the court entered judgment on the finding, overruling plaintiff's motion for a new trial. The other facts may be found in the opinion.

Messrs. D. & T. J. SHEEAN, for the plaintiff in error.

Mr. E. L. BEDFORD, and Mr. WILLIAM SPENSLEY, for the defendant in error.

Opinion of the Court.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court :

The question for our consideration upon this record is, whether the circuit court erred in instructing the jury that plaintiff in error could not recover unless he had the equitable as well as the legal title to the note upon which the suit is brought, at the time of the commencement of the suit. It may be conceded that if the assignment of Alice Ennor was purely formal, as, for instance, for collection, and she had the present right to the proceeds of the note, the circuit court properly instructed the jury. But although she may have been the equitable owner of the proceeds of the note, yet if that ownership was subject to the right and duty of plaintiff in error to control and manage them during his lifetime, the instruction was erroneous.

Alice Ennor is the daughter of plaintiff in error, and of his wife, Grace, now deceased. Before her death, Grace Ennor made her last will and testament, which has been duly probated and proved since her death, as follows :

"I, Grace Ennor, wife of William Ennor, being sick and am under the impression that I shall not recover, do this day assign over all personal property belonging to me unconnected with my said husband, in trust to William Ennor, my said husband, in trust for my daughter Alice Ennor for the purposes hereafter mentioned, also all monies due me from my husband which is as follows :—all my personal property I give to my only child alive, Alice Ennor, all the furniture in the house, also my gold watch with all my clothes, also the policy of insurance in the Northwestern Insurance Company at Milwaukee, Wis., on my said husband's life or for ten years if he lives,—which insurance was made for my sole benefit.

"Now I appoint my husband, William Ennor, my sole trustee for my daughter, Alice Ennor, wife of Martin Ennor, at Apple River, to act and transact all her affairs during his natural life, without the control of her said husband, he to have noth-

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ing to do in her affairs, all to be managed by William Ennor, my said husband, as long as he lives.

GRACE ENNOR. (Seal.)"

The effect of this is to give the control of this property to William Ennor during his life. Alice Ennor took the property subject to this right of control. She might have the aid of a court of equity to compel a faithful administration of the trust, and, under certain circumstances, to remove the trustee and appoint a new one in his stead; but she had no right to take the control of the property into her own hands,—and this is so as well since as before the enactment of our statute in relation to the separate property of married women. Since, as before, that enactment, she can neither dispose of property devised in trust, for her benefit, nor create a charge upon it, except in the manner and for the purposes specified in the devise. *Swift v. Castle*, 23 Ill. 209; *Conkling v. Doul et al.* 67 id. 355.

A part of the property thus devised was secured by mortgage on real estate. That mortgage was foreclosed, and the property bid in and title thereto taken by plaintiff in error. That property, in legal contemplation, but took the place of the personal property, and was impressed with the same trust. Nor was its condition changed by the conveyance by plaintiff in error to Alice Ennor. It was still a part of the property to be controlled and managed by plaintiff in error. When it was subsequently sold and conveyed to defendant in error, the consideration therefor was still trust property, which, under the terms of the will, plaintiff in error was entitled to manage and control. (Perry on Trusts, sec. 330.) The trustee was, therefore, entitled to the possession of the note, as against Alice Ennor, and the assignment of it is presumptively to enable him the more readily to collect the money and execute his trust.

But it is said the trustee has placed himself in antagonism to his trust, and thereby estopped himself to say that it is trust

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property. We can not concur in this conclusion. The only acts claimed to have been done by the trustee are the taking of title to himself, then conveying to Alice Ennor, then concurring with her in the sale and conveyance to defendant in error, then taking her assignment of the promissory note to himself, and, finally, the suit upon the promissory note. The conveyance to Alice was certainly a distinct admission of her title to the property, and his suit upon the note in his own name is, in view of the fact that his trust lasts for his lifetime, in strict subordination to his duties as trustee. The trust fund is as readily traceable into his hands by the transaction of the sale, without any statement in the assignment or upon the record that the note is for it, as with such a statement. Alice had no right to control and manage this money during the lifetime of the plaintiff in error, and by her assignment she placed the legal title to the note where the equitable right of present control was, and so put it beyond her power to receive into her hands payment of the note. Grace Ennor had a right to limit her gift by such restrictions as she chose to impose, and Alice, the beneficiary, is not equitably entitled to have those restrictions set aside, either by reason of the voluntary act or the negligent omissions of the trustee appointed to enforce them.

As between plaintiff in error and Alice Ennor, she is estopped by her assignment to say that the proceeds of this note have ceased to be trust property under the will of Grace Ennor. Defendant in error knew that Alice Ennor was not the holder of the note when he made the payment to her. The rule is, that a person paying a promissory note to one not its holder, does so at his peril. *Mobley v. Ryan*, 14 Ill. 51; *Paris v. Moe*, 60 Ga. 90.

For the error in giving the instruction referred to, the judgments of the circuit and Appellate Courts are reversed, and the cause is remanded to the circuit court for further proceedings consistent with this opinion.

Judgment reversed.

Syllabus. Brief for the Plaintiff in Error.

CHARLES S. YOUNG

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield June 12, 1890.

1. **PERJURY**—*elements to constitute the offense—materiality—evidence.*
On indictment for perjury in giving false testimony on the trial of an action of ejectment, the prosecution, in order to convict, must prove that the defendant testified in that suit, willfully, corruptly and falsely, on a matter material to the issue involved in the action of ejectment.

2. If the assignment of perjury is on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proven, or at least so much of it as shows that the matter sworn to was material.

3. Where the alleged false testimony relates to the execution of a deed the record of which was offered on the trial of an ejectment suit, in order to show the materiality of the testimony it will be necessary for the People to show what the chain of the title was, so as to establish the fact that the alleged deed was material; and such chain of title can not be shown by parol evidence, but must be shown by the title deeds, or enough of them to show the materiality of the deed to which the alleged false testimony related.

4. It is error to charge the jury, on the trial of one for perjury, that if they believe, from the evidence, beyond a reasonable doubt, the defendant willfully testified falsely in a material matter in the trial of a cause in court, as charged, etc., they should find him guilty. The statute requires the false testimony, to make out perjury, to be "in a matter material to the issue or point in question." Material matter may not be material to the *issue* or *point* in question.

WRIT OF ERROR to the Circuit Court of Vermilion county;
the Hon. EDWARD P. VAIL, Judge, presiding.

Mr. F. BOOKWALTER, and Mr. G. W. SALMANS, for the plaintiff in error:

Perjury is defined by our statute as follows: "Every person having taken a lawful oath, or made affirmation, in any judicial proceeding, or in any other matter where, by law, an oath

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Brief for the Plaintiff in Error.

or affirmation is required, who shall swear or affirm, willfully, corruptly and falsely, in a matter material to the issue or point in question, * * * shall be deemed guilty of perjury," etc. Rev. Stat. 1874, p. 387, sec. 225.

It is manifest that, under our statute, and even at common law, in order to constitute perjury the witness must have testified, corruptly, willfully and falsely, to a material matter in issue, and that the witness knew his testimony to be false when he gave it, and that he did so with a deliberate intention of misleading the court or jury. *Coyne v. People*, 124 Ill. 17; 2 Wharton on Crim. Law, (9th ed.) sec. 1244; 2 Roscoe on Crim. Ev. 856; 1 Bishop on Crim. Law, p. 198, sec. 320.

The alleged material matter concerning which defendant is charged with swearing falsely, is the execution of the alleged deed to Judson and others, a record copy of which was introduced in evidence in the ejectment suit. In the trial of this cause below, it was necessary for the prosecution to prove that the deed referred to had been executed by defendant,—that it related to the land in question, and formed a material link in the chain of evidence in the ejectment suit. The fact that certain testimony was admitted in evidence in the ejectment suit is not sufficient to warrant the jury, on the trial below, in inferring that it was material to the issue in that case, but its materiality must be proven. *Commonwealth v. Pollard*, 12 Metc. 225; 2 Bishop on Crim. Proc. sec. 916; 2 Wharton on Crim. Law, (2d ed.) 1281.

The prosecution did not prove, by competent evidence, that the alleged deed was material in the trial of the ejectment suit. It could be shown it was a link in the title only by the title deeds.

Mr. GEORGE HUNT, Attorney General, Mr. H. P. BLACKBURN, State's Attorney, and Mr. J. B. MANN, for the People.

Opinion of the Court.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment in the circuit court of Vermilion county, against Charles S. Young, for perjury. It appears that an action of ejectment was tried at the February term of the court, wherein William D. French was plaintiff, and Charles S. Young and others were defendants. On the trial the plaintiff introduced in evidence a record copy of an alleged deed purporting to have been executed by Charles S. Young to William D. Judson and others, for the land in controversy in the suit. The deed purported to have been executed on July 30, 1874. On the trial Charles S. Young testified in his own behalf. The indictment alleges that it became a material question at the trial whether Charles S. Young signed, executed and acknowledged the alleged deed, a record copy of which was introduced in evidence. It is also charged in the indictment that Charles S. Young testified, at the trial, that he never executed the alleged deed, and that he never deeded the said land described in said alleged deed to any man or any woman, and that he never heard tell of said alleged deed until in June, 1887, and that he never acknowledged the execution of said alleged deed, and that his testimony in regard to said allegations was willfully, feloniously, corruptly, knowingly and maliciously false.

Before alluding to the evidence introduced on the trial to prove the guilt of Charles S. Young, we will first refer to our statute, and ascertain what constitutes the crime of perjury.

Perjury is defined by our statute as follows: "Every person having taken a lawful oath, or made affirmation, in any judicial proceeding, or in any other matter where, by law, an oath or affirmation is required, who shall swear or affirm willfully, corruptly and falsely in a matter material to the issue or point in question, * * * shall be deemed guilty of perjury," etc. (Rev. Stat. 1874, p. 387, sec. 225.) Under the indictment, which was framed under this statute, it devolved

Opinion of the Court.

on the prosecution to prove that Charles S. Young testified, in the judicial proceeding named in the indictment, willfully, corruptly and falsely, in a matter material to the issue involved in the action of ejectment, and the first question presented by the record is, whether the evidence introduced by the People on this branch of the case was sufficient to warrant the verdict of guilty which the jury returned against the accused.

As has been seen from the allegations of the indictment, the material question upon which perjury has been assigned was the evidence of the defendant, Young, denying the execution of the deed purporting to have been executed by him, conveying the premises involved in the action of ejectment to W. D. Judson, Amos Tenney and Mary T. Young. The People, on this branch of the case, first read in evidence a record copy of the deed as it appeared recorded in the recorder's office of Vermillion county. Then, William A. Young, an attorney who assisted in the trial of the action of ejectment, for French, the plaintiff in the action, was called, and testified that the deed record, containing the deed from Young to Judson and others, was read in evidence on the trial. The witness then, over the defendant's objection, stated that there was one other original deed, and records of deeds, introduced in evidence to substantiate French's title. Witness could not identify the deeds put in evidence. The witness continued: "In the first place, there was a deed introduced, from George H. McNell to Charles S. Young. My recollection is, we went back to the entry of the property, but I don't remember anything back of McNell. I won't be sure about that, though; and then came this deed from Mr. Young to Judson, Tenney and Mary Young; and then there was a deed introduced from the grantor of Mr. French, who was John L. Donovan. There was a record of a deed from Tenney and Judson to Donovan, as I recollect." Question: "By an attorney in fact?" "Yes, sir; there was a power

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of attorney of record also introduced, showing authority, as I recollect, of the attorney to act—to make this deed. In one of the deeds it was decided the power of attorney was insufficient, or the deeds were rather insufficient, and they were ruled out.” The witness also testified: “There might have been other deeds introduced. I do not say that I have named all the deeds that were introduced.” The witness also stated that the record of the deed from Young to Judson and others was offered to prove one link in plaintiff’s chain of title. No deeds whatever were introduced for the purpose of showing that the alleged deed from Young to Judson and others was material, nor was any other evidence, except that of the witness Young, introduced on that subject.

We do not regard this evidence, which was all introduced against the defendant’s objection, as sufficient to establish the fact that the deed concerning which the defendant testified was material. In *Starkie on Evidence*, (vol. 3, page 1142,) in speaking upon this subject, the author lays down the following rule: “If the assignment be in evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material.” This rule is quoted with approval in *Russell on Crimes*, (vol. 2, p. 662.) Here the alleged deed was claimed to be a link in French’s chain of title. If it was, it would be material evidence. It was therefore necessary for the People to show what the chain of title was in order to establish that the alleged deed was material. This they undertook to do by the witness Young. But we do not think it was competent to prove a chain of title by parol. Resort should have been had to the deeds, or enough of them, at least, to show that the alleged deed from Young to Judson and others was material. We do not think, as has been suggested, that the action of ejectment should be tried over again, in ascertaining the guilt or innocence of the defendant, but enough of the deeds read in evidence on that trial

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should have been produced to show that the deed in question was material.

On behalf of the People the court gave two instructions, as follows :

"1. The court instructs the jury, for the People, that if you believe, from the evidence in the case, beyond a reasonable doubt, that the defendant willfully testified falsely in a material matter, in the trial of a cause in court, as charged in the indictment in this case, then you should find him guilty as charged in the indictment.

"2. That if you believe, beyond a reasonable doubt, from the evidence, that the defendant did execute the deed, a copy of which was introduced in evidence, and that he willfully denied having executed the same, on oath, in a trial where said deed was material, and that he willfully swore falsely about the same, as charged in the indictment, then you should find him guilty in this case."

In a case of this character, as a general rule, the materiality of testimony is a question of law, and not one of fact. (2 Bishop on Crim. Law, sec. 1039 ; 2 Bishop on Crim. Proc. sec. 935.) But treating it as a mixed question of law and fact, and thus one for the jury, the instructions were calculated to mislead the jury. In the first instruction the jury were directed to find the defendant guilty if he willfully testified falsely in a material matter, on the trial of a cause in court, while the statute requires the false testimony, to make out perjury, to be "in a matter material to the issue or point in question." The defendant may have sworn falsely in a material matter, and at the same time not sworn falsely in a *matter material to the issue*. On the trial of the ejectment suit it may have been a material matter who had held possession of the land, and the time the possession was continued, and under what title possession was held, and, under the instruction, if the defendant had sworn falsely on that branch of the case, the jury were directed to convict, although that was not the point in issue.

Syllabus. Opinion of the Court.

Nor was it the false testimony for which he was indicted. The same objection exists to the second instruction. We think the instructions were both calculated to mislead the jury, and they ought to have been either refused or modified.

The judgment will be reversed and the cause remanded.

Judgment reversed.

REBECCA MOORE

v.

ROBERT DICK *et al.*

Filed at Mt. Vernon June 13, 1890.

1. DOWER—allotment—upon what part of the premises—as, to abut upon a public road—right of election by the widow. Where there is no dwelling house on the premises in which dower is sought to be assigned, the commissioners assigning dower to the widow are not required by law to consult her wishes. They are only required to make a fair division, according to quality and quantity.

2. The statute does not require the commissioners to allot dower in such manner that the widow's allotment shall abut upon a highway. The failure to allot the dower on a highway is no ground for setting aside the commissioners' report, when it appears they have acted fairly, and have complied with the law and the order of the court.

APPEAL from the Circuit Court of Perry county; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. JOHN BOYD, for the appellant.

Mr. BENJAMIN W. POPE, for the appellees.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a petition brought by Rebecca Moore, formerly wife of James M. Morgan, against Robert Dick and John Lindsay, for an assignment of dower in the east half of the southwest quarter of section 26, town 5 south, range 1, west of the

Opinion of the Court.

third principal meridian, in Perry county, Illinois. It appears from the petition, that during coverture James M. Morgan owned the land; that in the month of September, 1848, petitioner obtained a divorce from Morgan on the ground of adultery; that in 1887 Morgan died. It also appears from the allegations of the petition, that Robert Dick owns the south half of said eighty acres of land, and John Lindsay owns the north half. The defendants to the petition failed to appear and answer, and a decree *pro confesso* was entered. The court, upon hearing the evidence, rendered a decree in favor of petitioner, and appointed three commissioners to assign and set off dower in the premises. The commissioners were sworn, as required by law, and after being sworn they went upon the premises and allotted and set off to the petitioner thirteen and one-third acres off the south end of the north half of the eighty-acre tract, and thirteen and one-third acres off the north end of the south half of the eighty. The commissioners reported the value of each forty to be \$1600, and the value of the land assigned as dower to be \$1066.66. Upon the coming in of the report of the commissioners the petitioner filed objections to its confirmation, and the court, upon hearing the evidence bearing on the exceptions, overruled all of them, and confirmed the report of the commissioners. To reverse the judgment of the circuit court the petitioner appealed.

The first objection urged against the report of the commissioners assigning dower is, that the wishes of the petitioner were not consulted by the commissioners, nor did they obtain her assent to the allotment. Section 35 of our Dower act provides that the commissioners shall go upon the premises, and if the same be susceptible of division without manifest prejudice to the parties in interest, shall set off and allot to the person entitled thereto, dower, by metes and bounds, according to quality and quantity. So far as appears, this was done by the commissioners. It is not claimed that they were guilty of misconduct, fraud or partiality, but merely that they

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did not consult the wishes of the petitioner. We do not think the statute imposed that obligation upon them. Section 37 provides that the surviving husband or wife shall have the homestead or dwelling house, if he or she desires. Under this section, if there was a dwelling house on the premises, it might be that the petitioner might have been entitled to an election; but the evidence shows that there was no dwelling house on the premises, and under such circumstances the commissioners were under no obligation to consult the wishes of the petitioner. They were only required to make a fair division, according to quality and quantity. The widow had not resided on the premises for over forty years, and no question of homestead was involved, and as there was no dwelling house on the premises, as said before, no obligation rested on the commissioners to consult the petitioner in making the allotment of dower.

It is also claimed that the report was erroneous because the premises set off to petitioner do not lie upon a highway, and that she has no means of ingress or egress except over other lands. A sufficient answer to this position is, that the statute does not require the commissioners to allot dower in such a manner that a petitioner will have the lands assigned on a highway; but if it did, the evidence heard by the court shows that there is a public road along the east line of the eighty-acre tract, which will afford petitioner ample opportunity to reach her lands. Whether the road was legally laid out or not does not appear, but the evidence shows the road has been open and traveled as a public highway for years.

Some other objections were urged to the report, but they are not of a character to merit a discussion. The commissioners, in making the allotment, acted fairly, and, so far as is shown by the record, complied with the order of the court and the statute, and the court did right in approving the report.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

Syllabus.

JOHN McNULTA, Receiver,

v.

JOHN ENSCH.

Filed at Springfield March 31, 1890.

1. NEGLIGENCE—railroads—stopping trains at passenger stations—giving passengers proper time—and herein, as to stations at which the particular train is not bound to stop. If a conductor of a fast train receives fare from passengers to a station at which such train is not advertised or scheduled to stop, it becomes the duty of the conductor to notify the passengers so paying, that the train will not stop at that station, or to carry them to such station and then give them sufficient time to get off in safety.

2. A railway company, whose duty it was to stop its train within eight hundred feet of a railroad intersection, on approaching such intersection stopped momentarily at a station platform about five hundred feet from the same, such train not being obliged to stop at that station, and then started with a violent jerk, whereby a passenger was injured while attempting to get off, and then stopped again some fifty or sixty yards nearer the intersection: *Held*, that evidence of such facts was sufficient to authorize an instruction based on the neglect to stop the train at the station a sufficient time to enable the passenger to get off in safety.

3. Where a train is not bound to stop at a particular station to receive or discharge passengers, but is required by law to stop within eight hundred feet of a railway intersection, some five hundred feet beyond such station, but the proof showed that the conductor received fare to such station, and that there were passengers for that station, and on approaching the station the whistle was sounded and the speed of the train slackened, and the train was finally stopped, it was *held*, that a passenger on the train, in the absence of a contrary announcement, had the right to act on the belief that the stop was to enable passengers to get off, and that the company was liable for an injury to a passenger caused by starting the train before allowing a reasonable time to get off.

4. In case the conductor announces a station, at which his train is not bound to stop, just before the same is reached, and if, following such announcement, the train actually does stop at the station platform, a passenger for such station would be justified in presuming it was for the purpose of discharging him there, and in proceeding to get off; and if, while it is so stopped, and with due promptness and care, the passenger attempts to get off, and is thrown down and injured by the

134	46
137	220

134	46
144	270
145	114
134	46
153	137

134	46
58a	237
58a	255

134	46
163	41

134	46
70a	241
70a	245

134	46
170	422

134	46
75a	190

184	46
183	473

184	46
101a	*127
e101a	*120
e101a	*180

184	46
109a	*516

184	46
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111a	*234
111a	*842

Syllabus.

starting up of the train, that presumption would become conclusive on the company. It could not avoid liability for such injury by stopping the train again a few rods further on.

5. Where the ordinary signal is given on approaching a station, and it is announced in the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train was going to stop at such station, and it does stop there, the company can not avoid liability to the passenger for an injury caused by the train starting before he has time to get off, by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given.

6. RECEIVER—*judgment against him—only in his fiduciary character.* A judgment against a receiver creates no personal liability against him, and it is to be so entered as to be enforced only out of the funds of the corporation properly chargeable to him in the capacity of receiver. It is error to render judgment against him individually, and no award of execution should be made. The judgment must be against him as receiver, and be made payable out of the funds held by him as such, in the due course of administration.

7. SAME—*liability to suit—questioned by plea—waiver.* An administrator or receiver, when sued in his representative capacity, admits that he is rightly so sued unless he files a plea denying the same. If he makes no objection to the suit against him in his representative capacity, before or on the trial, he will be precluded from afterward urging that he was not rightly sued.

8. NEW TRIAL—*disregarding erroneous instruction.* A new trial will not be granted because the jury may disregard an erroneous instruction, as no legal wrong is thereby done to the party at whose instance the instruction was given.

9. PRACTICE IN THE SUPREME COURT—*error after verdict—remandment with direction to enter the proper judgment.* Where the only error in a case consists in the form and effect of the judgment, a *venire facias de novo* will not be awarded on a reversal, but the cause should be remanded, with instructions to the trial court to enter the proper judgment.*

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Sangamon county; the HON. JAMES A. CREIGHTON, Judge, presiding.

* See *Meyer v. Village of Teutopolis*, 131 Ill. 552, and *Harris v. The People*, 130 id. 457.

Statement of the case.

This was an action on the case, brought by John Ensich, against John McNulta, receiver of the Wabash, St. Louis and Pacific Railway Company, in the Sangamon circuit court, to recover for personal injuries. The first count of the declaration charged the defendant was operating the railroad as receiver; that he was a common carrier; that he received the plaintiff as a passenger, to be carried from Springfield to Starne's Station, and that the platform there was constructed of unsuitable and defective material, and was in bad order and condition, etc. The second count charges that it was the duty of the defendant to stop such train at Starne's Station a sufficient length of time to enable plaintiff to get off the train in safety, and have the platform lighted, and that the defendant negligently failed to stop said train upon which the plaintiff was a passenger, etc., a sufficient length of time for that purpose, and negligently failed to cause a light to be placed upon the platform, by means whereof, the plaintiff being in the act of getting off the train after it had stopped, and in the night time, and while in the exercise of due care, etc., the train was suddenly started, and he was thrown between the platform of the station and one of the cars, and was caught by said car and carried beyond the platform, whereby he was injured, etc. The defendant pleaded the general issue only.

Upon the trial, plaintiff recovered judgment for \$2500. The court overruled a motion for a new trial, and rendered judgment on the verdict, and for costs. The defendant sued out of the Appellate Court for the Third District a writ of error, and assigned upon the record, for error, the following: First, that the verdict of the jury was contrary to the evidence; second, that the verdict was contrary to the law and the instructions of the court; third, that the court gave improper instructions at the instance of the plaintiff, there being no evidence on which to base said instructions; fourth, that the court erred in overruling defendant's motion for a new trial, and in rendering judgment against the receiver, personally.

Opinion of the Court.

The Appellate Court affirmed the judgment of the circuit court, and the defendant brings the case to this court by writ of error, and assigns for error that the Appellate Court erred in not reversing the judgment, and in affirming the same.

The only evidence offered by the plaintiff related to the alleged failure of the defendant to stop the train at Starne's Station a sufficient length of time to enable the plaintiff to get off the same in safety. The evidence as to whether the plaintiff paid his fare, and that it was received by the conductor, and as to whether the train stopped at all at the platform at Starne's Station, was conflicting. There was, however, no dispute as to the fact that the train did stop after passing the platform some fifty or sixty yards. The plaintiff got on the train going east, at Springfield, January 14, 1888, a little after nine o'clock P. M. The train was a through fast train, was not scheduled to stop at Starne's Station, and no tickets were sold for that point to be used on the train. There was also a conflict in the evidence as to whether the station was called immediately before reaching it, by the persons in charge of the train.

Mr. GEORGE B. BURNETT, for the plaintiff error.

Mr. C. A. KEYES, for the defendant in error.

Mr. CHIEF JUSTICE SHOFF delivered the opinion of the Court:

The first point made by the plaintiff in error is, that the court erred in giving plaintiff's first instruction. The reason assigned is, there was no evidence upon which to base it. The instruction is as follows:

"The court instructs the jury, that if they believe, from the evidence, that the plaintiff was a passenger on the train of the defendant on the night of the 14th of January, in the year 1888, and that while the plaintiff was so a passenger, the said train stopped at the station which was the destination of plaintiff, but that said train did not stop at said station for a

reasonably sufficient length of time to allow the plaintiff to safely get off of said train at said station, and that said plaintiff was injured by reason of said train not stopping at said station for a reasonably sufficient length of time to allow said plaintiff to safely get off of said train, then, and in that case, a *prima facie* case of negligence is made out against the defendant, and the burden of explaining such *prima facie* case of negligence is thrown upon the defendant, provided the jury further believe, from the evidence, that the plaintiff, at the time he received the injury, (if the jury believe, from the evidence, that the plaintiff did receive injury,) was acting with due care and caution."

There was evidence that the train made two stops before it reached the crossing of the Illinois Central railroad: First, at or near the platform of Starne's Station, though but momentarily, and again started with a violent jerk; and then, some fifty or sixty yards farther, and east of the platform, where ample time was given to passengers to get off. It was shown by the evidence that this train, which is called the "lightning express," was not scheduled or required to stop at Starne's Station, but it was required by law to stop within eight hundred feet of the crossing of the Illinois Central railroad, which was shown to be five hundred and two feet east of the platform at Starne's Station. There was ample evidence, if the jury believed it, that this lightning express train, going east, sometimes stopped at the platform at Starne's Station, sometimes stopped before reaching it, and often east of the same, and that passengers were in the habit of getting on and off the train at the place where it stopped before reaching the intersection of the two roads. In this case there was evidence that the engineer whistled before reaching the platform at Starne's Station, and slacked the speed of the train until the coach in which the plaintiff was riding reached said platform, when the train came to a stop. It is true that there was a conflict in the evidence on this point. Those of the witnesses testifying to

Opinion of the Court.

the stoppage of the train at the platform say it was a very short one,—only a moment or a second,—when the train started again with a sudden, violent jerk, so strong as to almost throw down those standing on their feet in the cars. The plaintiff testified, that knowing the train would stop there for a very short time only, and that there were a good many passengers to get off there, he went to the rear end of the car next the smoking car, and sat down on the steps, so as to be able to get off before the rush of the other passengers came, and he, as well as others, testified that the train came to a full stop in front of the platform. He was to some extent corroborated also in this, from the fact that his jug, after the injury, was found sitting on the platform. He testified that he stepped one foot on the platform, and, before moving the other from the step of the car, the train started suddenly, and with such force as to throw him down, and that the next car struck him as he fell.

We agree with counsel for the plaintiff in error that this instruction must have referred to this first, momentary, stopping of the train, and not to its stopping east of the platform, as there was no evidence that the train did not then remain long enough to let all the passengers off. While it may be and is true that the train was not bound to stop at the platform to discharge its passengers bound for that station, it might stop at any place within eight hundred feet of the railroad intersection, as those in charge saw fit; and while it did not undertake to discharge passengers at the platform, it must be borne in mind that the plaintiff could not know what point those in charge of the train would select as the place for him to get off, except by their acts and conduct. As was said by the Appellate Court: "The conductor or brakeman announced the station in the usual manner, just before it was reached, and if, following that announcement, and in about the usual time afterwards, it actually stopped at the station platform, passengers would be justified in presuming it was for the purpose of discharging them there, and in proceeding to get off;

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and if in the act of getting off while it was so stopped, and with due promptness and care, the plaintiff was thrown off and injured by the starting up of the train, that presumption would be conclusive upon the defendant. He could not avoid liability for such injury by stopping the train again a few rods further on, and then giving ample time for discharging the passengers. The jury must have found it did so stop," etc.

We think there was sufficient evidence upon which to predicate the instruction. So far as the rights of the plaintiff were concerned, the place where the train first stopped,—that is, the platform, (if it be found that it did stop at the platform, as has necessarily been done both by the trial and Appellate courts,)—must be regarded as the place where the defendant undertook to discharge him, there being no announcement to the contrary. Taking the evidence for the plaintiff as true, the acts and conduct of those in charge of the train justified the plaintiff in acting upon the assumption and belief that the train was there stopped to enable him to alight therefrom.

The defendant asked this instruction, among others:

"5. The court instructs the jury, that the only issue for their determination, under the evidence before you, is that presented by the second count of the plaintiff's declaration, which avers that the train did not stop a sufficient length of time to permit the plaintiff to get off in safety; and the court instructs you, that the legal effect of this averment is that said train did not stop a sufficient length of time at the point where the defendant undertook the discharge of the passengers for that place, and to entitle the plaintiff to recover, this averment must be proved as alleged; and if the jury believe, from the evidence, that said train did stop at the place where the defendant undertook to discharge the passengers at that place, a sufficient length of time to permit plaintiff to get off in safety, then plaintiff can not recover, and your verdict must be for the defendant, even though you may further believe, from the evidence, that before said train reached the place where the

Opinion of the Court.

defendant undertook to discharge said passengers, it made a momentary halt, and that plaintiff, in attempting to get off during said momentary halt, was thrown from the train and injured."

From what has preceded, it is apparent that this instruction contained an erroneous proposition. The second count of the declaration charges that it was the duty of the defendant to stop the train at Starne's Station long enough for the plaintiff to safely get off, and that he failed to do so, and that is the place where the plaintiff got off the train. He was not on the train when it stopped long enough for the passengers to get off. When the train stopped at the station, under the circumstances already stated, the plaintiff had the right to presume that the defendant proposed to discharge his passengers at that point, and to act upon that assumption, and the stop at the platform should have been long enough to allow the plaintiff to alight in safety. The evidence tended to show that the ordinary signal was given for the station, and also, as found by the Appellate Court, the station was announced in the cars, in the usual manner, by either the conductor or brakeman, and the defendant could not shield himself from liability to plaintiff, who started to get off immediately following such signal and announcement when the train came to a full stop at the platform, by showing that those in charge of the train intended to go further east before discharging the passengers, of which no notice was given. The stop at the platform, as to the plaintiff, under the peculiar facts of this case, might have been properly regarded by him as the stoppage of the train at the point where it was intended to let off the passengers. Having by the acts and conduct of his servants justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop his train a sufficient length of time to enable the plaintiff to reach the platform in safety. His duty to the plaintiff, whom he had induced to believe that the train had reached the point at which he was to depart

therefrom, was in respect of the place where the train first halted, and not in respect of the place where it finally stopped.

It is complained by the plaintiff in error that the jury must have disregarded this instruction, and it follows from what we have said, that if they did disregard it, no legal wrong was done the defendant. Although no tickets were sold at Springfield for Starne's Station, to be used on this train, the plaintiff and some twenty others were received upon this train, to be carried to Starne's Station, and there was evidence tending to show that they paid and the conductor received their fare. On collecting fare to Starne's Station, it became the duty of the defendant's servants to notify the passengers so paying that the train would not stop at that station, or to carry them to such station and then give them sufficient time to get off in safety. It may be that if the passengers knew that the train did not stop at the platform of the station, but at some convenient point near by, and before reaching the Illinois Central crossing, and took passage with that understanding, there would be no obligation to stop at the platform. The proofs tend to show that for several years before the accident the lightning express train received passengers at Springfield to be carried to Starne's Station, and it was well understood that the conductor of the train was in the habit of collecting fares to that place.

The plaintiff in error also claims there was no evidence that he was operating the railroad at the time of the injury, or that the persons in charge of the train were his servants, or that he was a common carrier. Railway companies are by law common carriers of passengers and freight. (*Toledo, Wabash and Western Ry. Co. v. Roberts*, 71 Ill. 542; *Parmelee v. McNulty*, 19 id. 556.) The proofs show that the Wabash, St. Louis and Pacific railway was being operated in carrying passengers before and at the time of the plaintiff's injury. This objection was not made in the trial court. No plea was filed putting in issue the representative character in which the defendant was sued. In a suit against an administrator, unless

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he denies the representative capacity in which he is sued, it will be admitted. (3 Chitty's Pl. 940, note k.) A judgment against the receiver creates no personal liability, and it is to be so entered as to be enforced only out of the funds of the corporation properly chargeable to him in the capacity of receiver. The fact, therefore, that the receiver made no objection to the suit against him in his representative capacity, before or at the trial, ought to preclude him from urging that he was not rightly sued. Plaintiff in error, in his brief, says: "The point is not that there is no evidence that defendant was receiver of the railway company, as the Appellate Court seems to suppose, but the point is, there was no proof that the defendant was operating the road at the time." If McNulta was the receiver of the road at the time of the injury, it must be presumed, in the absence of any plea or denial, that he was in discharge of the duty imposed upon him by that relation to the railroad. It will not be necessary for us to further discuss that question, for it was purely a question of fact. In no way has the plaintiff in error preserved the question in the record, so as to present it as a matter of law. The Appellate and trial courts having found the facts adversely to plaintiff in error, it is not open for our consideration.

It is lastly objected, that the judgment of the circuit court is erroneous, in that it is a personal judgment against McNulta. It is as follows:

"John Ensck v. John McNulta, Receiver of the Wabash, St. Louis and Pacific Railway Company.

"And now come the parties, by their respective attorneys, and the court, hearing the arguments of counsel upon the defendant's motion for a new trial, and being fully advised, overrules and denies the same. It is therefore ordered and adjudged by the court, that the plaintiff have and recover of and from the defendant the sum of \$2500, the damages aforesaid, as well as its costs by him herein expended, and that execution issue therefor."

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We are of opinion that the judgment is erroneous in the respect urged. No judgment could be rendered against McNulta individually, and no award of execution could be made. It must be entered against him as receiver, and be made payable out of the funds held by him in that capacity, in the due course of the administration of his receivership. Beach on Receivers, 715, and authorities cited.

This error will necessitate the reversal of the judgment of the circuit court, but as no error had intervened up to and including the overruling of the defendant's motion for a new trial, no occasion exists for awarding a *venire facias de novo*. In *Alwood v. Mansfield*, 33 Ill. 452, the court found that the verdict of the jury was sustained by the evidence, but that an improper order had been entered thereon by the circuit court, and the proper entry of judgment was made in this court. (See, also, *Pearsons v. Hamilton*, 1 Scam. 415.) In the subsequent case of *Storing v. Onley*, 44 Ill. 123, the better practice is said to be, to reverse the judgment and remand the cause, with instructions to the circuit court to enter the proper order. Without reference to other adjudications, the practice has been, in cases where the verdict of the jury was correct, and no error has intervened for which it should be set aside and a new trial awarded, to reverse the judgment improperly rendered upon the verdict, and to enter the correct judgment in this court, or to remand the cause, with instructions to the trial court to enter the proper judgment. We find in this record no other error than that indicated, and we regard it the better practice to remand the cause, with instructions.

For the error in the entry of the judgment, the judgments of the Appellate and circuit courts are reversed, and the cause is remanded to the circuit court, with instructions to enter judgment upon the verdict of the jury in conformity with the foregoing ruling, together with the costs of that court.

Judgment reversed.

Syllabus.

THE CONSOLIDATED COAL COMPANY

v.

GEORGE WOMBACHER.

Filed at Mt. Vernon April 27, 1890.

1. **NEGLIGENCE—master and servant—respondent superior.** A declaration in a suit by a servant against a coal company, showed that the defendant was the owner and operator of a coal mine, and had in its employ a pit boss, to whom it had given authority to direct and control the labors of those employed in its mine; that plaintiff was employed by defendant to labor in the mine, under the direction and control of the pit boss, and was so laboring; that the pit boss, knowing that there was loose overhanging rock in the roof of the mine, insufficiently braced to prevent its falling and doing great personal injury, falsely represented to plaintiff that there was no danger to be apprehended from the overhanging rock, and directed him to work under such loose rock in the roofing of the mine, and that plaintiff did then, pursuant to such directions, work thereunder, and while doing so, and without fault on his part, said overhanging rock fell from the roofing of the mine upon him, and severely wounded and injured him: *Held*, that the facts so alleged make a *prima facie* case of negligence.

2. Where the negligent act of one servant causing injury to another is the direct result of the authority conferred upon the former by the master over the servant injured, the master will be liable for such injury. In such case, the servant whose negligent act causes the injury, stands in the place of the master, and the servant injured has no discretion or independent judgment of his own, but owes the same duty of obedience that he would if the master were himself acting.

3. **SAME—danger of service—notice to agent in charge—presumption.** An agent or boss of a mining company, having charge of the mining operations and of the servants employed in the work, and power to direct and control them, will be presumed to have notice of the danger of a particular service he requires of a workman, and his neglect to inform the workman of such danger will be the negligence of the mining company.

4. **SAME—servant assuming risks of service—when entitled to notice.** A servant, in entering upon an employment, assumes only such risks as he has notice of, either express or implied; and it is culpable negligence on the part of the master to fail to notify him of risks which are not patent, and of which he is not cognizant from the nature of his employment.

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Statement of the case.

5. *SAME—master and servant—master estopped to deny an agent's or servant's authority.* Where a master permits his agent in charge of a mine to direct and control the workmen therein employed, as to the place they shall work, he will be estopped, when sued by a servant for an injury resulting from the negligent act of his agent, to deny the authority of the agent to direct the servant injured to work in a dangerous place.

6. *SAME—contributory negligence—matter of defense—requisites of the declaration.* In an action by a servant against a mining company, to recover for a personal injury received from falling rock while working in a place where he was directed, on the assurance of the company that there was no danger, whether the plaintiff was guilty of contributory negligence by knowing the danger and failing to observe due care to avoid it, if susceptible of proof, is a matter of defense which need not be anticipated or negatived in the declaration.

7. *PRACTICE—time to object—for a variance.* An objection that there is a variance between the declaration and the proofs, when made for the first time on appeal or error, comes too late.

APPEAL from the Appellate Court for the Fourth District ;—heard in that court on appeal from the Circuit Court of St. Clair county ; the Hon. W. H. SNYDER, Judge, presiding.

This was an action on the case, by appellee, against appellant. The declaration sets out that defendant, on the second day of February, 1888, at the village of Trenton, in St. Clair county, owned and operated a coal mine, from which it was mining coal ; that it had engaged there certain employes to run mining machines, and other employes to drill and blast coal after it had been mined by the machines, and other employes to load the coal into boxes to be transported to the bottom of the shaft, to be hoisted to the surface, and other employes to drive mules attached to the said boxes, and other employes to build roads, drive and open entries, and set up props to prevent clod, dirt, coal, rock or other overhanging material from falling ; that defendant had also an employe called a "pit boss," who was the master and director of the other employes, having power to employ and discharge and to control and direct all the said other employes ; that it was the

Statement of the case.

duty of those running the mining machines to mine coal, and the duty of the said blasters to drill and blast down the coal so mined, and of the loaders to load the said coal so mined and blasted upon boxes, and of the drivers to haul said coal to the pit bottom, and of the others to lay roads, and set props to prevent the falling of clod, dirt, rock and other material overhanging; that defendant had no props for the purpose of propping up said coal, clod, dirt and rock; that plaintiff was employed by defendant as a loader, and it was his duty to load coal on boxes in the mine; that while he was so engaged there was overhanging him a large quantity of rock which was not propped up; that while he was so engaged, the said pit boss examined the said rock, and directed the plaintiff to continue his labor thereunder, and represented to plaintiff that the said labor under said rock was without danger, and that said rock would remain overhanging until plaintiff could complete the work directed by the pit boss to be done; that plaintiff thereupon continued said work, and while so engaged, and without any fault or negligence on his part, the rock fell and crushed him, and fractured his spine, and caused paralysis of his lower extremities, and otherwise permanently and incurably injured him, on account of which he has been compelled to lay out \$500 for medical attendance, and has been deprived of the means of earning a living for himself and family; that the pit boss, at the time, knew it was dangerous to work under said rock which he had examined, and knew the rock was liable to fall on plaintiff, and, notwithstanding said knowledge, directed plaintiff to continue his labor there, and informed plaintiff that the said labor was then and there safe; that the said pit boss, well knowing the dangerous nature of said rock, and having full control of the employes whose duty it was to place props under said rock, neglected to order said props to be set, and, well knowing that said rock would fall and injure or kill plaintiff, falsely represented to plaintiff that said rock was solid, and, well knowing that said labor under said rock was

Brief for the Appellant.

dangerous, permitted and directed plaintiff to continue said labor, whereby, and by means of said neglect and knowledge and direction, and of said failure and neglect, of said pit boss, the plaintiff, without any fault on his part, was, by the fall of said rock, injured, to his damage of \$5000.

Appellant pleaded the general issue. The jury returned a verdict in favor of appellee, assessing his damages at \$2500. Motion for a new trial was made by appellant and overruled by the court, and the court thereupon entered judgment upon the verdict of the jury. Appellant then moved in arrest of judgment, but this also was overruled, and appellant then took the case, by appeal, to the Appellate Court for the Fourth District, and that court affirmed the judgment of the circuit court. The case is here by the appeal of the appellant from the last named judgment.

Mr. CHARLES W. THOMAS, for the appellant:

There was a total and fatal variance between the allegations of the declaration and the case made by the evidence. See Stephens' Pl. 107, 108; 1 Greenleaf on Evidence, sec. 79; *Bloomington v. Goodrich*, 88 Ill. 558; *Gavin v. Chicago*, 97 id. 66; *Moss v. Johnson*, 22 id. 633; *Railroad Co. v. McKee*, 43 id. 119.

The motion to instruct the jury to find for the defendant, presents the question of the sufficiency of the evidence to sustain the action. *Blanchard v. Railway Co.* 126 Ill. 416.

As to the liability of the master for the negligent acts of his agent or foreman having authority to direct and control other servants, see *Railroad Co. v. Ross*, 122 U. S. 377; *Railroad Co. v. May*, 108 Ill. 288; *Railway Co. v. Hawk*, 121 id. 259.

The judgment should have been arrested, for the reason the declaration shows no cause of action.

Brief for the Appellee.

Messrs. TURNER & HOLDER, and Mr. FRANK PERVISE, for the appellee :

The danger of the service required was known to Ritzheimer. If not actually known to him, by the exercise of ordinary care it could have been discovered by him, and he and his employer will be presumed to have known of the danger. Deering's Law of Negligence, sec. 200; *Whalen v. Railroad and Coal Co.* 16 Ill. App. 324; *Railroad Co. v. Russell*, 91 Ill. 298; *Railroad Co. v. May*, 108 id. 228; *Railroad Co. v. Avery*, 109 id. 314.

A master who places an inexperienced person at work in a dangerous position is bound to give him due caution and instruction. Deering's Law of Negligence, sec. 197; *Dowling v. Allen*, 74 Mo. 13; *Railway Co. v. Goebel*, 119 Ill. 515.

The master is also bound to provide a safe place for the servant to perform his labor. Deering's Law of Negligence, sec. 199; *Ryan v. Fowler*, 24 N. Y. 410; *Whalen v. Railroad and Coal Co.* 16 Ill. App. 324; *Railway Co. v. Conroy*, 68 Ill. 560; *Railroad Co. v. Russell*, 91 id. 298; *Wuotilla v. Lumber Co.* 37 Minn. 153.

It is now the well settled law of this State, that one servant known as "conductor," "section boss," "pit boss," "foreman," or other appropriate term, who directs other servants under his charge where to work and what work to do, is not a fellow-servant within the rule that one servant can not recover for an accident caused by the negligence of a fellow-servant, but is regarded as a "vice-principal" or "superior," for whose negligence the common master will be liable. *Railroad Co. v. May*, 108 Ill. 288; *Rolling Mill Co. v. Johnson*, 114 id. 57; *Railway Co. v. Hawk*, 121 id. 259; *Railroad Co. v. Blank*, 24 Ill. App. 439.

Such is the law in nearly every State, if not in every State, in the Union. *Railroad Co. v. Keary*, 3 Ohio St. 201; *Cowles v. Railroad Co.* 84 N. C. 309; *Moon v. Railroad Co.* 78 Va. 745; *Danigan v. Railroad Co.* 52 Conn. 285; *Railway Co. v. Swanson*, 16 Neb. 254; *Anderson v. Bennet*, 16 Ore. 515.

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Such is the law declared by the United States courts, both District and Supreme. *Railroad Co. v. Ross*, 112 U. S. 377; *Railroad Co. v. Herbert*, 116 id. 647; *Thompson v. Railroad Co.* 14 Fed. Rep. 564.

The same doctrine is applied to a temporary foreman or pit boss, appointed by and acting under instructions from the regularly employed foreman or pit boss. The source of his authority is immaterial, if it be traced back to the common master, through different persons. *Railroad Co. v. May*, 108 Ill. 288; *Rolling Mill Co. v. Johnson*, 114 id. 57; *Railroad Co. v. De Armond*, 86 Tenn. 73.

The only test is, has the person in command authority to direct men where, when and how to work, and what work to do; and such men have no opportunity to avoid the negligent acts of another without disobedience to their immediate superior. *Rolling Mill Co. v. Johnson*, 114 Ill. 57.

The common laborer must be held subject to the orders of such foreman, and, being so held, should be entitled to be recompensed for injury caused by the negligence of such foreman, he being without fault. *Rolling Mill Co. v. Johnson*, 114 Ill. 57; *Railway Co. v. Hawk*, 121 id. 259.

It is too late for appellant to avail itself of an objection upon the grounds of a variance. If a variance actually existed, the objection should have been made on the trial, so that it might have been obviated by an amendment, if deemed material. *Bloomington v. Tebballs*, 17 Ill. App. 456; *Elgin v. Kimball*, 90 Ill. 356; *Railway Co. v. Estes*, 96 id. 473; *Horne v. Walton*, 117 id. 130.

MR. JUSTICE SCHOLFIELD delivered the opinion of the Court:

Since, in this class of cases, our jurisdiction is limited to the determination of questions of law, our consideration of appellant's argument must be confined to the questions:—First, is the declaration sufficient to sustain the judgment? second, can we consider whether there is a variance between

Opinion of the Court.

the allegations and the evidence? and third, ought the court to have instructed the jury to find for the defendant? The other parts of that argument relate wholly to the effect and weight of the evidence, and ought therefore to have been presented to the Appellate Court in a petition for rehearing, where, alone, they would have such relevancy as would entitle them to consideration. The questions before us will be briefly considered in the order stated.

First—It is, among other things, sufficiently stated in the declaration that appellant is owner and operator of a coal mine, and has in its employ a pit boss, to whom it has given authority to direct and control the labors of those employed in its mine; that appellee was employed by appellant to labor in its mine, under the direction and control of this pit boss, and was so laboring; that this pit boss, knowing that there was loose overhanging rock in the roofing of the mine, insufficiently braced to prevent its falling and doing great personal injury, falsely represented to appellee that there was no danger to be apprehended from overhanging rock, and directed him to work under such loose overhanging rock in the roofing of the mine, and that appellee did then, pursuant to such direction, work thereunder, and while doing so, and without fault or negligence on his part, said overhanging rock fell from the roofing of the mine upon appellee, and severely wounded and injured him.

These facts, *prima facie*, make a case of negligence. That appellee was guilty of contributory negligence by knowing of the danger and failing to observe due care to avoid it, or otherwise, if susceptible of proof, was matter of defense which need not have been anticipated and negatived in the declaration. (*Cox v. Brackett*, 41 Ill. 222; *Illinois Central Railroad Co. v. Simmons*, 38 id. 242.) Where the negligent act of one servant causing injury to another is the direct result of the exercise of the authority conferred upon him by the master over the servant injured, the master is liable. In such case, the servant

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whose negligent act causes the injury stands in the place of the master, and the servant who is injured has no discretion or independent judgment, but owes the same duty of obedience that he would if the master were himself acting. *Chicago and Alton Railroad Co. v. May*, Admr. 108 Ill. 288; *Wabash, St. Louis and Pacific Ry. Co. v. Hawk*, 121 id. 259; *Rolling Mill Co. v. Johnson*, 114 id. 57; *Northern Pacific Ry. Co. v. Herbert*, 116 U. S. 647; *Chicago, Milwaukee and St. Paul Ry. Co. v. Ross*, 112 id. 377; *Thompson, Admr. v. Chicago, Milwaukee and St. Paul Ry. Co.* 14 Fed. Rep. 564.

Second—No evidence was objected to as irrelevant and not tending to sustain the declaration, and admitted by the court over that objection, and no motion was made upon the trial to exclude all or any evidence from the consideration of the jury for the reason that it was irrelevant and did not tend to or actually sustain the declaration. The question of variance was presented for the consideration of the court for the first time in the Appellate Court. This was too late, and we therefore can not now entertain that question. *City of Elgin v. Kimball*, 90 Ill. 356; *Indianapolis and St. Louis Ry. Co. v. Estes*, 96 id. 473; *Ladd v. Pigott*, 114 id. 647; *Wabash, St. Louis and Pacific Ry. Co. v. Coble*, 113 id. 115; *City of Mattoon v. Fallin*, id. 249; *Horne v. Walton*, 117 id. 130; *Schoonmaker v. Doolittle*, 118 id. 605; *Dulin v. Prince*, 124 id. 76.

Third—We think there was evidence tending to sustain the material allegations of the declaration, however insufficient we might regard it if we were required to determine where is the preponderance. Ritzheimer, the night pit boss, is shown to have had sole charge of appellee and other laborers at the time appellee was injured. As to his authority he said: "I could tell a man to go and do this, or quit." That, clearly, is all that his master could have done.

There is evidence that the roofing of the room in the mine in which appellee was working when injured was in an unsafe condition, and that a laborer had previously refused Ritzheimer

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to work in it at day wages because of its condition. Appellee, among other things, testified that he was a farmer, but latterly had been a laborer; had worked in this mine from November, 1887, until February 7, 1888,—the day he was injured; and his examination then proceeded thus:

Q. "State where you regularly worked in that mine.

A. "For something over a month I had been working in the entry. I was throwing coal into the boxes. I was loading the coal. The coal was blasted by some other persons. I had nothing to do with shooting the coal down. I am not a practical miner. That was done by extra men.

Q. "State whether or not you had anything to do with propping up the roof of the mine.

A. "No; I had nothing to do with that. The mining machine had not got around to the entries yet, and I had no work to do, and was sitting down in the entry, waiting, when Peter Ritzheimer, the night pit boss, came along, and said to me, 'You have nothing to do?' I said 'No,' and he then said, 'Come along with me into that room—there is a load of coal there.' I then went into that room and worked there about three hours before I was hurt. The top fell down on me. I laid there, covered with rock and slate, until I was taken out by others. * * * I am paralyzed in the lower extremities. My bladder is also paralyzed. I have been in that condition since the accident. I am a married man, and have a family of five children,—the oldest is thirteen years of age. I am without means, and had to depend upon my wages for support. I never worked in the room where I was hurt, before this night in which I was injured. I knew nothing of its condition as to safety."

He also said that no one told him that it was dangerous. Under this evidence, Ritzheimer is to be assumed to have known of the danger from the roof, and his negligence in failing to communicate it to appellee is the negligence of appellant. By permitting Ritzheimer to act as he did, appellant is es-

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topped to deny his authority in that respect. (*Lake Shore and Michigan Southern Railroad Co. v. Brown*, Admz. 123 Ill. 162.) And a servant in entering upon an employment, as appellee here did, assumes only such risks as he has notice of, either express or implied; and it is culpable negligence in the master to fail to notify the servant of risks which are not patent, and of which he is not cognizant from the nature of his employment. *United States Rolling Stock Co. v. Wilder*, 116 Ill. 100; *Citizens' Gas Light Co. v. O'Brien*, 118 id. 174.

The judgment is affirmed.

Judgment affirmed.

WILLIAM SOBY

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield June 12, 1890.

1. BUCKET-SHOPS—*gambling in stocks, grain, etc.—act of 1887—scope and purpose of the act.* The act of 1887, entitled "An act to suppress bucket-shops, and gambling in stocks," etc., is directed against the keeping of any office or place, etc., wherein is conducted or permitted the pretended buying or selling of grain or other produce, on margins or otherwise, without any intention of receiving or delivering the property bought or sold.

2. The statute makes it an offense to keep a place, office, etc., wherein is conducted or permitted the pretended buying or selling of produce on margins.

3. For the purpose of preventing the evils resulting from such shops, and bucket-shopping, and of suppressing the vice of gambling in grain, it was intended by that act to close, suppress and prohibit the keeping of places where the practice of bucket-shopping or gambling in grain is permitted.

4. SAME—*intention—want of knowledge—as a defense.* It is not necessary to show the intention of the keeper of the office or place of business to bring the transaction within the prohibition of the statute. So the keeper of such office or place can not shield himself from criminal responsibility behind the fact that he made no inquiry of his customers. The keeper must know that the transactions at his office are

134	66
42a	39
134	66
155	629
134	66
67a	368
134	66
171	82
173	25
134	66
179	440
134	66
181	453
484	66
94a	*232
134	66
98a	1218
134	66
196	1403
196	1406
e101a	*346
134	66
106a	*508
134	66
e209	1543
209	*544
e209	545
111a	116

Syllabus.

not gambling, or he must have just reason to believe that the buying or selling is not within the intended prohibition of the statute.

5. *SAME—want of intention to consummate the bargain.* The offense is complete where the party buying such produce, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold.

6. *SAME—actual purchase to protect the buyer—effect on the character of the transaction.* Where a purchase of grain is made by an agent, and no delivery is intended, it being a speculation on the rise and fall of the market, the fact that the principal has made purchases in good faith of like amounts of grain to protect himself, will not change the nature of the transaction with the agent, and free it from the taint of gambling.

7. *SAME—agency—no excuse for violating the statute.* If it is made unlawful to keep an office or place at which grain is illegally bought or sold under gambling contracts, it can make no difference that the person keeping such office is acting as the agent of another who makes purchases or sales on the Board of Trade for his customers. Such an agent is by the act made punishable, the same as his principal.

8. The command of a superior to an inferior, as, of a military officer to a subordinate, or of a parent to a child, will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent.

9. *CONSTRUCTION OF STATUTES—rule of construction.* In construing a statute, the primary consideration is to ascertain and give effect to the legislative intention. In order to accomplish this object, the court should look at the whole act, and seek to ascertain such intention by an examination and comparison of its various provisions. The court may also consider other and prior acts relating to the same general subject, and thus ascertain what mischiefs the later legislation was designed to remedy, and the true spirit and import of such legislation.

10. The courts are not permitted, by the rules of construction, to extend the body of an act by reference to its title, but they may consider the title for the purpose of determining what was within the legislative contemplation.

WRIT OF ERROR to the Circuit Court of Morgan county; the Hon. CYRUS EPLER, Judge, presiding.

Mr. EDWARD L. McDONALD, and Mr. H. G. WHITLOCK, for the plaintiff in error.

Mr. GEORGE HUNT, Attorney General, and Mr. CHARLES A. BARNES, State's Attorney, for the People.

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Mr. JUSTICE BAKER delivered the opinion of the Court:

The plaintiff in error, William Soby, was indicted and convicted in the Morgan circuit court for violation of the act of the legislature entitled "An act to suppress bucket-shops, and gambling in stocks, bonds, petroleum, cotton, grain, provisions and other produce," in force July 1, 1887. (3 Starr & Curtis' Ann. Stat. p. 165.) The first and second sections of the act are as follows:

"Sec. 1. That it shall be unlawful for any corporation, association, co-partnership or person to keep or cause to be kept within this State any bucket-shop, office, store, or other place wherein is conducted or permitted the pretended buying or selling of the shares of stocks or bonds of any corporation, or petroleum, cotton, grain, provisions or other produce, either on margins or otherwise, without any intention of receiving and paying for the property so bought or of delivering the property so sold, or wherein is conducted or permitted the pretended buying or selling of such property on margins, or when the party buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold; and the keeping of all such places is hereby prohibited. And any corporation or person, whether acting individually, or as a member, or as an officer, agent or employe of any corporation, association or co-partnership, who shall be guilty of violating this section, shall, upon conviction thereof, be fined in any sum not less than \$200 and not more than \$500; and any person or persons who shall be guilty of a second offense under this statute, in addition to the penalty above prescribed, shall, upon conviction, be imprisoned in the county jail for the period of six months, and, if a corporation, shall be liable to forfeiture of its charter; and the continuance of such establishment after first conviction shall be deemed a second offense.

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"Sec. 2. It shall not be necessary, in order to commit the offense defined in section 1 of this act, that both the buyer and the seller shall agree to do any of the acts therein prohibited, but the said crime shall be complete against any corporation, association, co-partnership or person thus pretending or offering to sell, or thus pretending or offering to buy, whether the offer to sell or buy is accepted or not; and any corporation, association, co-partnership or person who shall communicate, receive, exhibit or display, in any manner, any such offer to so buy or sell, or any statements or quotations of the prices of any such property, with a view to any such transaction as aforesaid, shall be deemed an accessory, and, upon conviction thereof, shall be fined and punished the same as the principal, and as provided in section 1 of this act."

The fourth section of the act is as follows: "Whoever knowingly permits any of the illegal acts aforesaid in his building, house, or in any out-house, booth, arbor or erection of which he has the care or possession, shall be fined not less than \$500 nor more than \$1000, and any penalty so adjudged shall be a lien upon the premises on or in which such unlawful acts are carried on or permitted. It is the intention of this act to prevent, punish and prohibit, within this State, the business now engaged in and conducted in places commonly known and designated as bucket-shops, and also to include the practice now commonly known as bucket-shopping, by persons, corporations, associations or co-partnerships who ostensibly carry on the business or occupation of commission merchants, or brokers in grain, provisions, petroleum, stocks and bonds; and it shall be the duty, under this act, of all the judges of the several circuit courts, * * * at every regular term thereof, to charge all regularly impaneled grand juries to make due investigation, and report upon all violations of the provisions of this act."

It appears from the evidence that the plaintiff in error had an office in Jacksonville, in this State, where he transacted

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what he called a grain commission business, as agent of Robert Lindbloom & Co., members of the Board of Trade of Chicago. He received daily, by telegraph, from 9:30 A. M. to 1 P. M., and from 2 to 3 o'clock P. M., quotations of the Chicago, New York, St. Louis and Liverpool markets, on wheat, corn, oats, pork, lard, etc., which he displayed, as received, upon a black-board, for public inspection. He professed to buy and sell such products on the Chicago market, receiving from his customers a margin of two cents per bushel on wheat and corn, unless the customer wished to limit his "loss," when a margin of one cent was required. In the latter case "the deal would be closed out if the market declined one cent." With a two-cent margin, if wheat declined he "would collect more margins." There was to be no "delivery unless the option matured." The defendant says: "I kept an office where we were buying and selling on the Chicago market. Bought and sold on margins. The object of my displaying quotations on the black-board was to show the people what the market was. They could buy if they wished to do so. I kept them there with a view to selling or buying on margins. My business will average 10,000 bushels a day." He also says: "I have not bought or sold a bushel of wheat since I have been in Jacksonville. I never asked the intention of customers. Customers could have grain delivered to them if they wished."

It appears from the evidence that Charles James bought 5000 bushels of wheat and 5000 bushels of corn, and put up with the defendant two cents margin per bushel. He bought in October, for May delivery, and closed the deal in a few days at an advance on his margins. He says: "My intention was to make money out of it, by buying and selling it on the fluctuations of the market." He neither got nor delivered any grain when he bought or sold. He says: "I was to pay nothing but the margin of two cents until May, unless necessary. Would have had to put up more margins if the first had been absorbed by the price going down. If I did not do this the

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grain would have been sold out. Did not get grain for actual use, but to make money out of it."

In construing a statute, the primary consideration is to ascertain and give effect to the legislative intention. In order to accomplish this object the court should look at the whole act, and seek to ascertain such intention by an examination and comparison of its various provisions. (*Mason v. Finch*, 2 Scam. 223; *People v. Canal Comrs.* 3 id. 153; *Perteet v. People*, 65 Ill. 230.) The court may also consider other and prior acts relating to the same general subject, and thus ascertain what mischiefs the later legislation was designed to remedy, and the true spirit and import of such legislation. *Stribling v. Prettyman*, 57 Ill. 371.

By the revised Criminal Code of 1874 it was made a criminal offense to contract to have or give the option to sell or buy, at a future time, any grain or other commodity, etc., and it was provided that all contracts made in violation of such law should be considered gambling contracts, and should be void. It was held, under that statute, that even though a contract purported upon its face to be an absolute contract for the sale or purchase of grain or other commodity for future delivery, yet the transaction would be a gambling contract, within the prohibition of the statute, if the real intention of both parties, at the time of making the contract, was to deal only in options, and make future settlement upon the basis of the differences in the market price, without the actual delivery of the grain or other commodity sold or purchased. But it was also held, under the same statute, in numerous cases, that if either party contracted in good faith, the contract was a valid and binding contract, no matter what may have been the secret intention of the other party.

It is manifest that the object of the statute was to suppress and prevent gambling in grain and other commodities; but so great was the difficulty of establishing the unlawful intent of the parties making illegal contracts, and so many were the

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shifts and devices resorted to for the purpose of concealing the true character of the gambling transactions entered into, that the statute was found to be ineffectual to accomplish the purpose for which it was enacted. It is a matter of common notoriety, that, notwithstanding the highly penal character of the statute of 1874, the evil it was aimed at continued to increase with wonderful rapidity throughout the State, and until in almost every city or town of any considerable importance, commission houses, offices or agencies were established, in which the great bulk of the business transacted was the making of contracts which, while legitimate upon their face, were in fact mere gambling transactions, which were never allowed to mature, but were uniformly adjusted before maturity upon differences in market price, and without any actual delivery of the articles which were the subject matters of such pretended contracts. To remedy the mischief, the legislature, satisfied of the futility of attempting to suppress gambling in grain and other commodities by striking merely at the gambling contracts themselves and the parties entering into such contracts, has sought, by the statute of 1887, to suppress all bucket-shops, offices, stores, or other places wherein gambling in grain or other commodities is conducted or permitted, and to do this, punishing by fine, imprisonment or forfeiture of charter, any person, co-partnership, association or corporation that keeps or causes to be kept a place of that character within the State, and also punishing, by a fine of not less than \$500 nor more than \$1000, the owner of any building who knowingly permits on his premises any of the illegal acts denounced by the statute.

It would seem clear, from the evidence, that the plaintiff in error kept an office or place wherein was "conducted or permitted" the buying or selling of grain or other produce on margins, "without any intention of receiving and paying for the property so bought or of delivering the property so sold," and wherein was "conducted or permitted the pretended buying or selling of such property on margins," and "where the party

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buying any of such property, or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold."

A consideration of the act will, as before indicated, show that it is directed against the keeping of any office or place, etc., first, wherein is conducted or permitted the pretended buying or selling of grain or other produce, on margins or otherwise, without any intention of receiving the property bought or delivering it if sold. Under this clause of the first section, the offense consists in keeping the place, etc., where such buying or selling is conducted or permitted. That plaintiff in error kept the office or place is conceded, and that buying and selling upon margins, without any intention on the part of the customer to receive the thing bought or to deliver the thing sold, was permitted in such office or place so kept by the plaintiff in error, is also substantially conceded, and if it were not, is abundantly proved. Under this provision of the act, the keeper of such office or place, etc., can not shield himself from criminal responsibility behind the fact that he made no inquiry of his customers. The statute is preventive in its character, and is aimed at the keeping of places where gambling in grain is permitted. The keeper must know that the transaction is not gambling, or, in good faith, have just reason to believe that the buying or selling is not within the intended prohibition of the statute. But if this were not so, there is abundant evidence in this record to show that the plaintiff in error knew that his customers did not contemplate an actual delivery of the commodity bought or sold.

Again, the second clause makes it an offense to keep a place, etc., wherein is conducted or permitted the pretended buying or selling of such produce on margins. It is scarcely contended that the customer did not, in fact, intend only to purchase options, and to make money in the rise and fall of the market, without any expectation of receiving or delivering grain. In other words, it is too plain for argument, that the buying and

selling of grain was a mere pretense, at least so far as the customer was concerned.

Again, the third clause creates the offense where the party buying such produce, or offering to buy the same, does not intend actually to receive the same if purchased or to deliver the same if sold. Here the proof establishes, beyond question, that purchases were made without any intention of receiving the commodity purchased. The only object was to make money on the fluctuations of the market by the pretended purchase of the grain on margins.

It is, however, insisted, that plaintiff in error took orders from persons who wished to buy or sell grain, and sent them by telegraph to Lindbloom & Co., his employers, who were members of the Chicago Board of Trade, and that Lindbloom & Co. went upon the Board of Trade and executed the orders, and then reported the fact of such execution to the plaintiff in error, and he to the customer. These customers, at the time of making the orders, deposited a margin, which was to secure Lindbloom & Co. against loss if the grain declined or raised, as the case might be, and if it declined or raised sufficiently to exhaust the deposited margins, the customers were required to make and keep the margins good.

It is said that the fact that the business of plaintiff in error was thus conducted shows that it was a straightforward, legitimate business, "with no relation to or connection with a bucket-shop or bucket-shopping." Counsel lose sight of the fact that the circumstance that plaintiff in error was claiming to act as an agent of or was in fact acting as an agent of Lindbloom & Co., can not absolve him from liability. If it was unlawful to keep the office or place, it can make no difference that he was their agent. It is expressly provided in the statute, that any agent or employe of any corporation, association or co-partnership, who shall be guilty of keeping or causing to be kept any of the places before mentioned, for the purposes prohibited, shall, upon conviction, suffer the penalty imposed by

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the act. But if it were not so provided in the act, he would be liable upon common law principles, notwithstanding his agency. Bishop, in his work on Criminal Law, (vol. 1, sec. 355,) formulates the rule thus: "The command of a superior to an inferior, as, of a military officer to a subordinate, or of a parent to a child, will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent; but in all these cases the person doing the wrongful thing is guilty, the same as though he had proceeded self-moved."

Nor can the fact that Lindbloom & Co. may have gone on to the Board of Trade and made like contracts of purchase or sale, avail plaintiff in error. As before said, the act is intended to prevent the keeping of places where gambling in grain is conducted or permitted. If the employers of plaintiff in error, in order to protect themselves, made, even in good faith, purchases or sales of like amounts of grain or produce, it would not change the nature of the transaction which had transpired between plaintiff in error and his customer, so as to free it from the taint of gambling, since in respect of such customer it would still be a mere gambling upon margins—a mere speculating upon the rise and fall of the market.

It is apparent from the whole act, from the title to the concluding sentence, that the purpose and object of the legislature was to suppress the evil of gambling in produce. . Primarily, it was intended to reach and suppress the bucket-shop and bucket-shopping, from which much of the evil sought to be corrected necessarily flows. But it is manifest, that, probably owing to the difficulty of securing conviction where all the elements to constitute a bucket-shop or the practice of bucket-shopping, as the same have been defined in the decisions of the courts, are required to be established, the legislature saw proper to strike a fatal blow at both bucket-shops and bucket-shopping by prohibiting the keeping of all offices, places, etc., where gambling in grain or other produce is carried on or

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permitted. There can be no question but that the evil of gambling in futures was present in the business carried on by plaintiff in error. There is in the evidence even just ground for the conclusion that it was present, to all intents and purposes, as fully as if his office had been denominated a bucket-shop, instead of an agency or a commission house. The shifts and devices so easily and frequently resorted to for the purpose of giving to transactions tainted with gambling the semblance of legitimate deals, were sufficient considerations, in the legislative judgment, to require, as a matter of public policy, that all places wherein is conducted or permitted the pretended buying or selling of property such as is specified in the act, on margins or otherwise, shall be prohibited. If two firms, members of the Board of Trade, could be found who were willing to enter into such a scheme, it is manifest that, one firm representing agencies in half the commercial centers of the State, and the other representing the other half, could buy or sell, to fill the orders of their respective agents, from each other, receive the margins, and "ring out their deals" without a bushel of grain or pound of any other commodity changing hands. Yet if either demanded the grain or other product of the other, the contract would be so drawn as to be a valid sale and purchase of the produce itself, and they could, without legal perjury, testify that it was to be delivered if desired by the party entitled to it under the contract. By such means the State would still be subject to all the evils of the bucket-shop and bucket-shopping.

We are not permitted, by the rules of construction, to extend the body of the act by reference to its title, which is, "An act to suppress bucket-shops, and gambling in stocks, bonds, petroleum, cotton, grain, provisions and other produce," but we may consider it for the purpose of determining what was within legislative contemplation. (*Perry County v. Jefferson County*, 94 Ill. 214.) The legislature, by the fourth section, as we have seen, declares that it is the intention of this act to prevent,

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punish and prohibit within this State the business now engaged in and conducted in places *commonly known* and designated as bucket-shops, and also to include the practice now *commonly known* as bucket-shopping, etc. To accomplish this purpose the legislature has prohibited the keeping of the places where what is *commonly known* as bucket-shopping is carried on. They have not in the body of the act prohibited the keeping of bucket-shops, or the practice of bucket-shopping, only, but have included the keeping of every place wherein is conducted or permitted gambling in grain or other produce, and have expressly provided that it shall not be necessary, in order to commit the offense, that both the buyer and seller shall agree to do any of the acts therein prohibited. By the act, the mere offer by the corporation or person keeping such place to make such pretended sale or purchase, whether the offer to sell or buy is accepted or not, renders the offense complete against such corporation or person. Such corporation or person is also prohibited from communicating, receiving, exhibiting or displaying, in any manner, any such offer to so buy or sell, or any statement or quotation of the prices of such property, with a view to any transaction of the kind prohibited. Moreover, as we have already seen, the person knowingly permitting any of the acts prohibited by the statute in any house or place owned by him, is subjected to a heavy penalty.

It is apparent, we think, that the legislature, for the purpose of carrying into effect their expressed intention of preventing the evils resulting from bucket-shops and bucket-shopping, and to suppress the vice of gambling in grain and other produce, so detrimental to the interests and welfare of the people, have determined to close, suppress and prohibit the keeping of places where the practice of bucket-shopping or gambling in such commodities is permitted. No other construction of the act would be consistent either with its letter or spirit. We are of opinion that it is no longer possible in this State, under any shift or device, however specious, to keep an office or other

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place where parties may, under the pretense of buying or selling grain or other produce, engage in speculation in futures, and gamble upon the rise and fall of the market, and, as we have seen, the legislature have, as they might, rendered it unnecessary to show the intention of the keeper of the office or place, to bring the transaction within the prohibition of the statute. All legitimate commercial transactions, whether upon the Board of Trade or elsewhere, must be upheld and enforced, and it may undoubtedly be true that agencies might be established throughout the State for carrying on such legitimate business; but this agency manifestly was not of that character.

The conviction was fully warranted under the first and second counts of the indictment, and must be sustained. The first and second counts being sufficient to sustain a conviction, we are relieved of the necessity of determining whether the sixth count was good or not.

We have carefully considered the entire record, and find no error therein. The judgment of the Appellate Court is accordingly affirmed.

Judgment affirmed.

WILLIAM T. BLAIR

v.

THOMAS W. SENNOTT.

Filed at Ottawa June 12, 1890.

1. CERTIORARI—at the common law—what matters may be considered. Upon certiorari at common law it can only be inquired, first, whether the inferior court has exceeded its jurisdiction; and second, whether it has proceeded according to law;—and this can only be determined from an inspection of the record. No fact can be considered unless it is a part of the record.

2. RECORD OF COURT PROCEEDINGS—refusal to make proper record—remedy. If a court refuses to make a proper record of its proceedings, the remedy is by *mandamus*, and not by *certiorari*.

134	78
244	518
134	78
56a	212
134	78
61a	428
134	78
164	218
134	78
170	24
179	461

134	78
89a	991

134	78
197	5428

134	78
200	3468

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3. PROBATE COURT—*preserving the evidence—in what way.* There is no mode by which the evidence given in a proceeding before the probate court can be lawfully preserved and made a part of the record.

4. The remedy for error of the probate court in ruling upon the evidence is by appeal to the circuit court, and this is adequate.

5. SAME—*presumption in support of the ruling of the probate court.* Where the probate court has jurisdiction of the subject matter and of the persons of the parties, the same presumption in favor of the rulings of that court must be indulged in as in favor of the circuit court, under like circumstances.

6. ADMINISTRATION OF ESTATES—*citation to surrender property to the administrator—what property to be included—the statute construed.* Section 81, chapter 3, of the Revised Statutes of 1874, authorizing the citation of any person having in his possession any goods, chattels, moneys or effects "belonging to any deceased person," does not mean merely goods, chattels, moneys, etc., placed in the hands of the party charged by the deceased in his lifetime, but includes also goods, etc., which belong to the estate of the deceased, and which may come into the hands of the party charged since the death of the deceased. As a dead person can own nothing, the words, "belonging to any deceased person," can only mean, "belonging to the estate of any deceased person."

7. SAME—*action under the citation—amendment of affidavit.* An administrator has the right to file an amended affidavit in a proceeding by him in the probate court, under section 81, chapter 3, of the Revised Statutes, entitled "Administration," and after the filing of such amended affidavit, proceedings under the original affidavit will be considered as abandoned.

8. SAME—*whether proceeding is under amended affidavit.* After the filing of an amended affidavit by an administrator, to discover and reach property concealed or kept by one wrongfully, and to compel its delivery to the administrator, it will be presumed that the proceeding was conducted under the amended affidavit; but the whole record may be looked into, to see whether the subsequent steps and orders were taken under the amendment or under the original affidavit.

9. TRUSTS AND TRUSTEES—*money in the hands of an agent—held in trust—identity of funds—presumption—breach of trust as a defense.* Money of a principal in the hands of the agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes. While the agent has the money, the agent is not the debtor of the principal, but simply his trustee.

10. In such case, it will be presumed that the money in the hands of the agent is the identical money that he received, and he will not be heard to allege his embezzlement or breach of trust, to escape liability arising from that presumption.

Brief for the Appellant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. FRANK BAKER, Judge, presiding.

Mr. C. C. MARSH, for the appellant:

The probate court has no jurisdiction to bring before it third parties, and settle conflicting interests. *Pahlman v. Graves*, 26 Ill. 405.

The statute is not designed to afford the means of collecting debts due an estate, but for obtaining the possession of the money, books, etc., which remain in specie. *Williams v. Conley*, 20 Ill. 643.

It is designed to be a summary remedy to reach assets which might be reached by detinue, trover or replevin, only. It is strictly a possessory action. *Wade v. Pritchard*, 69 Ill. 279.

No presumption is indulged in favor of the judgment or jurisdiction of an inferior court, nor of any court proceeding under a statute passed in derogation of the common law. The party seeking the aid of the statute must show by the record that all his proceedings are within the scope of the statute whose aid is invoked. Absence of affirmative facts prescribed by the statute can not be helped by presumption. *Ayer v. Town of Lake*, 11 Ill. App. 564; *Gibbon v. Bryan*, 3 id. 298; *Deming v. Corwin*, 11 Wend. 648; *Evans v. Bouton*, 85 Ill. 579.

The county and probate courts, as organized in this State, have not general jurisdiction, and are such inferior courts that the question of their jurisdiction may be reached by the writ of *certiorari*. *People v. Williamson*, 13 Ill. 660; *Preston v. Spaulding*, 120 id. 208.

The amended petition is not out of the case, there being no authority to amend it. Rev. Stat. chap. 7, sec. 8; *Donlin v. Hettinger*, 57 Ill. 348.

The probate or county court has no jurisdiction over the subject of the trust. *Lill v. Brant*, 1 Ill. App. 266; *Steele v. Clark*, 77 Ill. 471.

 Brief for the Appellant.

Money belonging to "a deceased person" is not legally equivalent to money belonging either to "the estate of the deceased person" or to "the executrix of decedent." *Voorhies v. Ewbunk*, 6 Clark, (Iowa,) 274.

On *certiorari*, the transcript certified becomes the return to the writ and a part of the record, and by its inspection, alone, are the rights of the parties to be determined. *McManus v. McDonough*, 4 Ill. App. 180; *Gerdes v. Champion*, 108 Ill. 137; *Commissioners v. Supervisors*, 27 id. 140.

The writ is obeyed by returning and certifying the order and proceedings in ordinary cases. Wood on *Mandamus* and *Certiorari*, 200.

All the papers of a cause, when filed below, become and are a part of the record of that court, and transcripts are made by copying the files and orders of the court as entered of record there. *Stevison v. Earnest*, 80 Ill. 513; *Harding v. Larkin*, 41 id. 413; *Zimmerman v. Cowan*, 107 id. 631; *Nat. Bank v. Elmira*, 53 N. Y. 49.

It may be necessary that the return shall set forth such facts as are necessary to show jurisdiction,—a recital of the facts, but not the evidence. *Star v. Trustees*, 6 Wend. 565; Powell on Appellate Proc. 354; *Truitt v. People*, 88 Ill. 518; *People v. Overseers*, 15 Barb. 286; *Niblo v. Posts*, 25 Wend. 279; *Stone v. Mayer*, id. 156.

The evidence touching the facts must be returned, so that the reviewing court can see whether there was jurisdiction. *Jackson v. People*, 9 Mich. 111; *People v. Van Alstyne*, 32 Barb. 131.

Certiorari, and not *mandamus*, was the proper writ to be issued, and should have been issued, in this case, to compel the perfecting of the record in the probate court, the judge before whom the case was heard having ceased to be an acting probate judge in Cook county, and to all purposes in that case a judge out of commission. *People v. Pearson*, 2 Scam. 189; 3 id. 270.

Brief for the Appellant.

Certiorari lies against a judge out of commission, and even to the executors of a deceased judge. 2 Hawkins' Pleas of the Crown, chap. 27, sec. 39; *Galbraith v. Green*, 13 S. & R. 85; *O'Leary v. People*, 4 Parker, 187.

For the proper course to get the facts before the court, see *Moore v. Hamilton*, 4 Zab. 532; *Scott v. Beatty*, 3 id. 256.

Certiorari is the proper proceeding to test the question of the jurisdiction of the probate court in this case.

There are two classes of cases in which, according to the previous decisions of this court, a common law writ of *certiorari* will lie: First, whenever it is shown that the inferior court or jurisdiction has exceeded its jurisdiction; second, whenever it is shown that the inferior court or jurisdiction has proceeded illegally, and no appeal or writ of error will lie. *Hyslop v. Finch*, 99 Ill. 171.

To the same effect are the following cases: *People ex rel. v. Williamson*, 13 Ill. 660; *Doolittle v. Railroad Co.* 14 id. 381; *Railroad Co. v. Whipple*, 22 id. 105; *Railroad Co. v. Fell*, id. 333; *Gerdes v. Champion*, 108 id. 137; *Miller v. Trustees*, 88 id. 26; *Supervisors v. Magoon*, 109 id. 142; *Ennis v. Ennis*, 110 id. 78.

Certiorari, and not appeal, is the proper proceeding for the purpose of resisting the jurisdiction of the tribunal below. *Gauthier v. Watkins*, Md. Ct. of App. Feb. 18, 1887.

An appeal is a recognition of the jurisdiction of the court in which the judgment or decree was rendered.

An appeal to the circuit court can give no broader jurisdiction or right than the court below had. *Dodge v. People*, 113 Ill. 491; *Stolberg v. Ohnmacht*, 50 id. 442; *Peak v. People*, 71 id. 278.

The only remedy in such case is by the common law writ of *certiorari*, when the court below had no jurisdiction. *Lill v. Brant*, 1 Ill. App. 266; *Commissioners v. Hoblit*, 19 id. 259; *Frizzell v. Rogers*, 82 Ill. 111; *People v. Williamson*, 13 id. 660.

Brief for the Appellee.

Mr. J. F. SNYDER, for the appellee :

The statute confers authority on the probate court to determine whether a person has in his possession property belonging to an estate. *Steinman v. Steinman*, 105 Ill. 348; *Wade v. Pritchard*, 69 id. 279.

If such person refuses to deliver up such property or effects, the court may commit such person to jail until he shall comply with the order of the court therein. *Starr & Curtis' Stat. chap. 3, par. 82.*

For jurisdiction of probate courts, see *Starr & Curtis' Stat. chap. 37, par. 253.*

The county courts in this State are courts of general jurisdiction in respect to all matters coming within the purview of their jurisdiction, and the same presumptions in favor of their jurisdiction prevail as in favor of circuit courts. *Matthews v. Hoff*, 113 Ill. 90; *Barnett v. Wolf*, 70 id. 76.

For power of the court to enforce its orders, see *Starr & Curtis' Stat. chap. 3, par. 131*; *Johnson v. Von Kettler*, 84 Ill. 315.

The county court, to the extent it has jurisdiction, (and this extends to the settlement of the estates of deceased persons,) exercises equitable jurisdiction. *Brandon v. Brown*, 106 Ill. 519; *Hurd v. Slaten*, 43 id. 348; *Wadsworth v. Connell*, 104 id. 369; *Moore v. Rogers*, 19 id. 346; *Millard v. Harris*, 119 id. 185.

Certiorari does not require of the evidence or a certificate of the facts outside of the record. *Donahue v. Will County*, 100 Ill. 94; *Doolittle v. Railway Co.* 14 id. 381.

It is no part of the office of a writ of *certiorari* to an inferior tribunal, to bring before the court from which the writ issued the evidence heard in the court below, nor can the court receive testimony to show what that evidence was. See, also, on the same point, *Railroad Co. v. Whipple*, 22 Ill. 105; *Railroad Co. v. Fell*, id. 333; *Railroad Co. v. Barrows*, 24 id. 562;

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Commissioners v. Supervisors, 27 id. 140; *Low v. Railroad Co.* 18 id. 324; *Gerdes v. Champion*, 108 id. 137; *Savage v. Commissioners*, 10 Ill. App. 204.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

This was a common law *certiorari*, issued by the circuit court of Cook county, bringing before that court the record of the probate court of the same county, ordering appellant to deliver to Martha Tafft, administratrix with the will annexed of the estate of Henry Tafft, deceased, certain moneys found to be in his hands, and belonging to that estate.

Some complaint is made of the failure of the probate court to make up the record, showing what actually transpired in the proceeding before that court. If a court refuse to make a proper record, the remedy is by *mandamus*, and not by *certiorari*. Upon *certiorari* it can only be inquired, first, has the inferior court exceeded its jurisdiction; and second, has it proceeded according to law. (*Hyslop v. Finch*, 99 Ill. 171; *Donahue v. Will County*, 100 id. 94; *People v. Wilkinson*, 13 id. 660; *Doolittle v. Galena and Chicago Union Ry. Co.* 14 id. 381; *Miller v. Trustees of Schools*, 88 id. 26.) And this can only be determined from an inspection of the record. In no case can any fact be considered, whether consisting of evidence given upon the hearing, or of affidavits in support or denial of motions, unless it is lawfully a part of the record brought before the court. See cases cited *supra*, and *Commissioners v. Supervisors*, 27 Ill. 140; *Gerdes v. Champion*, 108 id. 137; *Chicago and Rock Island Railroad Co. v. Whipple*, 22 id. 105.

There is no mode by which the evidence given in a proceeding before the probate court can be lawfully preserved and made a part of the record. The remedy for error in ruling upon the evidence is by appeal to the circuit court. (Rev. Stat. 1874, chap. 3, sec. 124; *Ennis v. Ennis*, 103 Ill. 95.) And this is adequate and ample.

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The first affidavit filed in this proceeding charged appellant with withholding the title to real estate. Subsequently, an amended affidavit was filed, charging him with having in his possession and refusing to deliver money which had come into his hands as an agent and attorney. The right to file an amended affidavit in such a proceeding is denied by appellant, and he also denies that the order directing him to deliver the money to the administratrix was made pursuant to the amended affidavit. We can not concur in either of these views. There is nothing in the statute from which it can be inferred that the power to institute the proceeding was intended to be exhausted by the first effort in that direction. We think, on the contrary, that the proceeding may be repeatedly instituted against the same party, where he is guilty, successively, of the acts specified in the statute as authorizing it to be instituted. And there can, therefore, be no reason why an administrator who discovers that he was misinformed and mistaken as to the facts when he filed an affidavit, should not be allowed to subsequently file an amended affidavit, setting up the facts correctly, allowing the party charged ample opportunity to answer the charge as thus amended. The proceedings before the court are, to a large extent, informal, and no technical, formal particularity is required in the orders of the court. It is enough, in cases like the present, that it can be seen, from the language of the order, that it is in the proceeding upon the amended order. The whole record must be considered, and it is not to be presumed that there was any other or different proceeding than it discloses. When the amended affidavit was filed, proceeding under the original affidavit was by that act abandoned. The order, therefore, being made subsequently to the filing of the amended affidavit, could only have reference to the amended affidavit. Moreover, its language is responsive to the amended affidavit, and entirely inconsistent with the original affidavit.

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The substance of the amended affidavit is, that appellant, as the agent of Henry E. Taft, deceased, in his lifetime loaned money for him, taking certain securities for its repayment; that since the death of said Taft appellant has collected, on account of such loan and from such securities, the amount of such loan, and has the same in his possession, and refuses to deliver or pay it over to the administratrix, after demand made for that purpose. The court, in its order, finds that "said William T. Blair has in his possession the sum of \$153, belonging to said estate," which it orders him to "turn over to said Martha W. Taft, administratrix with the will annexed of the estate of said decedent, within twenty-four hours," etc. It shows that appellant was present in court when the order was made, and that it was made by the court after "having heard the evidence adduced and the arguments of counsel." Counsel contend that the facts stated in the amended affidavit create merely the relation of debtor and creditor between the estate and appellant, and therefore bring the case within the ruling in *Williams v. Conley*, 20 Ill. 643, and *Pahlman v. Graves*, 26 id. 405.

The proceeding is under section 81, chapter 3, of the Revised Statutes of 1874, which, so far as affects the present question, reads as follows: "If any executor or administrator, or other person interested in any estate, shall state, upon oath, to any county court, that he believes that any person has in [his] possession, or has concealed or embezzled, any goods, chattels, moneys or effects, books of account, papers, or any evidence of debt whatever, or titles to lands, belonging to any deceased person, * * * the court shall require such person to appear before it by citation, and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require." In our opinion this does not mean merely goods, chattels, moneys, etc., placed in the hands of the party charged by the deceased in his lifetime,

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but we think it includes also goods, chattels, moneys, etc., which belong to the estate of the deceased and which have come into the hands of the party charged since the death of the deceased. The language contemplates present ownership, and since a dead man can own nothing, "belonging to any deceased person" can only mean "belonging to the estate of any deceased person,"—and so we held in *Steinman v. Steinman*, 105 Ill. 348. Money of the principal in the hands of the agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes. While he has this money, he is not, technically, the creditor of his principal, but simply his trustee. (Mechem on Agency, sec. 780.) It is, in such case, therefore, always the legal presumption that the money in the hands of the agent is the identical money that he received, and he will not be heard to allege his embezzlement or breach of trust to escape a liability arising from that presumption. Mechem on Agency, sec. 785; Story on Agency, secs. 229, 230; *Trustees v. McCormick*, 41 Ill. 323; *Cotton v. Holliday*, 59 id. 176.

Thomas v. People, 107 Ill. 517, is not analogous to the present case. There the question was, whether a payment by a master in chancery of the distributive share of an heir-at-law in certain lands sold on partition to a person claiming to be administrator of such heir-at-law, the heir-at-law being alive, was such a payment as would discharge the master in chancery from liability, and it was held that it was not, because it is impossible that there can be an administrator of a living person—that the appointment of the administrator was a nullity, because the probate court had no jurisdiction to act in the case of living persons. But here there is no question of the death of Henry E. Taft, or of the lawful appointment of Martha W. Taft as his administratrix, and there is therefore jurisdiction over the estate; and, as has been seen, the affidavit, in our opinion, sufficiently charges that appellant has money in his hands belonging to the estate, to give the court jurisdic-

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tion to inquire as to the truth of that charge, under section 81, chapter 3, of the Revised Statutes of 1874, and there was jurisdiction of the person of appellant. Having jurisdiction of the subject matter and of the person, the same presumptions in favor of the correctness of the ruling of the probate court must be indulged as in favor of circuit courts, under like circumstances. *Matthews v. Hoff*, 113 Ill. 90; *Barnett v. Wolf*, 70 id. 76.

We find no reason justifying a reversal of the judgment below. It is therefore affirmed.

Judgment affirmed.

In re ESTATE OF GEORGE CASHMAN, deceased.

Filed at Ottawa June 12, 1890.

1. **WILLS—rule of construction.** The main object in the construction of a will is to ascertain the intention of the testator as expressed in the instrument, and that intention must prevail, unless it is inconsistent with the rules of law. No clause of a will should be disregarded, but each clause must be considered in connection with the other provisions.

2. **SAME—of the estate devised—life estate—with right of use, and the power of disposition.** A testator devised to his wife, for life, eighty acres of land and certain personal property, in lieu of her dower and homestead, with a proviso that she might, at her election, have the land sold with other land and accept in lieu thereof \$3000 in money, "to be accepted and held by her, as above provided in reference to said real estate, during her natural life," and the will then provided, "that after her death all of the said property to her devised and bequeathed (or so much thereof as may remain unexpended) to be converted into money," and the proceeds divided among the testator's children. The widow elected to take the money: *Held*, that she took the \$3000 for life, with the right to its use and control, and its possession, without restriction, and also with the right to expend any part of that sum before her death, and that the use of the word "unexpended," clearly implied the power to expend the money so devised.

3. As a general rule, where a power of disposal accompanies a devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life can make, unless the will contains words indicating

134	88
169	399
184	88
181	519

134	88
182	117

134	88
192	57

134	88
202	286

134	88
e205	1557

134	88
211	*482
211	*488
211	485
111a	*185

134	88
215	*186

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that a larger power was intended. But a life estate may be created with power to dispose of the fee, and limit a remainder over after the termination of the life estate.

4. Where money or other property is devised to one for his or her life, and the will provides that "whatever shall remain," or all of the property so devised, or so much thereof "as may remain unexpended," the language will clearly imply a power of disposition by such devisee or life tenant, in his or her discretion.

WRIT OF ERROR to the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. ARTHUR A. SMITH, Judge, presiding.

Mr. FREDERICK A. WILLOUGHBY, for the plaintiff in error:

When a testator gives to one, for life, a certain sum out of his estate, with a limitation over to another, the former has no right to the possession of the money thus bequeathed, nor to anything more than the interest on such sum. *Welsch v. Belleville Savings Bank*, 94 Ill. 206.

MESSRS. WILLIAMS, LAWRENCE & BANCROFT, for the defendant in error:

A life estate may be created with power of disposition in the life tenant, and limit a remainder over after the termination of the life estate. *Kaufman v. Breckenridge*, 117 Ill. 316; *Markillie v. Ragland*, 77 id. 98; *Hamlin v. Express Co.* 107 id. 443.

The use of the word "unexpended" implies the power to expend, and applies not to the interest or income of the \$3000. *Markillie v. Ragland*, 77 Ill. 98; *Pritchard v. Walker*, 22 Ill. App. 294.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

George Cashman died testate, in Knox county, on the 11th day of February, 1880. His wife, Rebecca Cashman, and his son, James L. Cashman, were named executrix and executor of his will. The will was admitted to probate on the 8th day

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of March, 1880, and the executrix and executor named, qualified as such, and entered upon the discharge of their duties. In the settlement of the estate, the surviving executor, James L. Cashman, claimed in his report a credit of \$3000, money paid to the widow, Rebecca Cashman, as devisee under the will, which the county court approved. On appeal to the circuit court, the action of the county court was reversed, but upon a further appeal to the Appellate Court the decision of the county court was affirmed, and we are called upon, by this writ of error, to review the decision of the Appellate Court.

The decision of the question involves a construction of the second clause of the will, which is as follows:

"*Second*—I give, devise and bequeath unto my beloved wife, Rebecca Cashman, the following described real estate, to-wit, the south half ($\frac{1}{2}$) of the south-west quarter ($\frac{1}{4}$) of section seven (7), in township nine (9), north of range two (2), east of the fourth (4th) principal meridian, situated in the county of Knox and State of Illinois, together with all hereditaments and appurtenances thereunto belonging or in anywise appertaining, during her natural life; also one milch cow, to be selected by her, and all the household furniture, of every name and nature whatsoever, during her natural life, all of said property to her devised and bequeathed to be received and accepted by her in lieu of dower and homestead: *Provided, however*, that she, my said wife, may elect to have the above described real estate sold and conveyed by my executors hereinafter named, in connection with my adjoining land or lands, (if by them deemed for the best interests of my estate,) and accept in lieu thereof the sum of three thousand (\$3000) dollars in money, to be accepted and held by her as above provided in reference to said real estate during her natural life, and that after her death all of the said property to her devised and bequeathed (or so much thereof as may remain unexpended) to be converted into money by my executors, and the net proceeds thereof to be divided equally between all of my children and their descendants, ac-

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ording to law, except the descendants of my son John Cashman, deceased, to-wit, my grandsons George Cashman and John Cashman, who are hereinafter provided for by a specific allowance or legacy in full of all interest in my said estate."

The widow elected to have the real estate described in the will sold, and in pursuance of her election the land was sold and conveyed, and the \$3000 was paid over to her in lieu of the land. It is contended on behalf of the executor of the estate, that, under the second clause of the will, Rebecca Cashman took a life estate in the \$3000, with the right to use and expend so much of both principal and interest as she might think proper, and if any portion of the amount should remain at her death, such remaining portion should be distributed among the heirs, as provided in the will; while, on the other hand, it is contended by the heirs that the widow took only a life estate in the \$3000, without the power of disposing of any part of the principal.

The main object in the construction of a will is to ascertain the intention of the testator, as expressed in the instrument, and that intention must prevail, unless it is inconsistent with the rules of law. It will be observed that in the first part of the second clause of the will the testator devised to his wife, Rebecca, eighty acres of land, one cow, and all his household furniture, for her natural life,—that the devise was made in lieu of dower and homestead. Then follows a proviso that the wife may elect to have the real estate sold in connection with other adjoining lands, and accept in lieu of the land \$3000 in money, during her natural life. Had nothing more been said in the will by the testator, there would be much force in the contention of the heirs; but the testator, for purposes of his own, saw proper to go on and add another clause, as follows: "And that after her death all of the said property to her devised and bequeathed (or so much thereof as may remain unexpended) to be converted into money by my executors, and the net proceeds thereof to be divided equally between

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all of my children," etc. This clause in the will can not be disregarded, but in arriving at the intention of the testator it must be considered in connection with the other provisions, and after a due consideration of all the provisions, determine what the testator intended by the language used.

This court has held in a number of cases, that, as a general rule, where a power of disposal accompanies a devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life could make, unless the will contains words indicating that a larger power was intended. (*Welsch v. Belleville Savings Bank*, 94 Ill. 191; *Henderson v. Blackburn*, 104 id. 227; *Kaufman v. Breckinridge*, 117 id. 313.) The rule is also well established in this State, that a life estate may be created with power to dispose of the fee, and limit a remainder after the termination of the life estate. (*Kaufman v. Breckinridge*, *supra*, and cases there cited.) Under the will in question, in the event that the widow elected that the land devised to her should be sold, she was entitled to receive, in lieu of the land, \$3000. That the money was to be paid over to her, and that she should take the management and control of it, is, we think, plain, from the language of the will. We do not attach any special importance to the words, "to be accepted and held by her," but as the \$3000 is devised to her with no provision that it should remain in the hands of the executor, and with no limitations or restrictions whatever in respect to passing into her possession, we think it manifest that the intention was to place her in the full possession, control and management of the money.

The widow, then, being invested with the possession and control, the next inquiry is, whether she had the power or right to expend any portion of the money. It is true that the money was willed to her during her natural life, but it is apparent, from the language of the will, that the testator anticipated that she might or would expend a part or all of the money, as the

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will, in clear terms, declares, that upon the death of the widow the unexpended portion of all the property devised to her shall be converted into money and be divided between certain children of the testator. The use of the word "unexpended" clearly implied the power to expend. Had the testator intended to restrict the widow to the use, only, of the interest on the \$3000, language indicating such an intention doubtless would have been found in the will, and he would no doubt have declared that upon her death the \$3000 should be divided, instead of the unexpended balance of the property devised to her.

The clause in the will in question is not unlike a provision in a will passed upon in *Markillie v. Ragland*, 77 Ill. 102. There the testator devised his real and personal estate to his wife, during life, with power of disposal. This was followed by a provision, that upon the death of the wife, whatever might remain of the estate should descend to his heirs. In construing the will it is said: "Had he not intended that his wife should have power to sell his real estate, why speak of what should remain of it at his wife's death? * * * He, we think, clearly intended that his wife should have the unlimited discretionary power to sell any or all of his property, whether personal or real." The same may be said here. Had the testator not intended that his wife should expend any portion of the property devised to her, why speak of the unexpended portion of the property at her death?

Walker v. Pritchard, 121 Ill. 221, is also a case in point. There certain real and personal property was willed to the wife, the following language being used: "During her natural life, as aforesaid, and at the death of my said wife all the property hereby devised or bequeathed to her, as aforesaid, or so much thereof as may remain unexpended, to my two sons." In placing a construction on the language used, it is said: "We think it is manifest, from a consideration of the various provisions of the will, and in the light of the surrounding circumstances, that it was the intention of the testator that his widow

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should convert to her own use, and consume, if she deemed she had occasion so to do, the residue of moneys in her possession, whether on hand at his death or realized from the notes, and that the remainder-men should only have such portion thereof, if any, as remained unexpended at the time of her death. * * * We are of opinion the will in question gave to Elotia Pritchard a life estate in one hundred and sixty-eight acres of land, with power to sell and convey the same in fee, and convert the proceeds and avails thereof to her own use and benefit, with remainder in the land, if unsold under the power, and if sold, then remainder in such portion of the proceeds and avails as remained unexpended at time of death of the donee, to the two sons of the testator."

In *Henderson v. Blackburn*, *supra*, the testator devised to his wife real and personal property for life, with power to dispose of so much as she might need or wish to use, and after her death, the will provided, if anything was left it should be divided between certain persons. In construing the will, it was held that the words, "and after her death, if there is anything left," imply a power of disposition by the widow of the whole property devised. It is there said: "We find * * * the words which we have adverted to, clearly indicating that a larger power of disposal was intended to be given by the will than that of a life estate,—a power of disposal of the fee,—and hence that the case does not come within the doctrine relied upon, limiting the right of disposition to the life estate, where there is a power of disposal accompanying a devise of a life estate."

In other States the same rule in similar cases has been announced. In *Clark v. Middlesworth*, 82 Ind. 240, the Supreme Court of Indiana, in deciding the case, said: "We think it quite clear that the will of O. B. Clark gave to his widow, Mary A. Clark, a life estate in said lot, and that it also gave her, by the clearest implication, a power to dispose of the same. The words, 'and at her death, should anything remain,' are

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senseless and without meaning, unless the testator intended that the tenant for life might, prior to her death, dispose of the property devised to her for life. The words clearly show that he must have contemplated this at the time, and therefore have intended it."

In *Harris v. Knapp*, 21 Pick. 412, the Supreme Court of Massachusetts, in deciding a case where similar words are used in a will, said: "The words, 'whatever shall remain,' necessarily mean that portion of the property bequeathed which shall be undisposed of at her decease, but there is no allusion in the will to any mode by which the sum thus given (during her life) is to be diminished, except the disposition thereof to be made by Mrs. H. (the life tenant), and therefore the implication is inevitable, that she had a power to make such disposition. This is inconsistent with the supposition that the whole was to remain undiminished in the hands of the executor, or other trustees, for the purpose of satisfying the gift over." See, also, *McKenzie's Appeal*, 41 Conn. 607; *Ramsdell v. Ramsdell*, 21 Me. 288.

From the authorities cited, after a careful examination of the language of the will, we are satisfied that the proper construction to be placed upon the second clause of the will conferred upon Rebecca Cashman, upon a sale of the eighty acres of land, the right to take and hold the \$3000, and expend for her own use and benefit the income therefrom, and so much of the principal as her necessities might demand or her judgment dictate, and that portion of the \$3000 which shall remain unexpended at her death, and that only, was to be divided between the children of the testator in the manner declared in the will.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE EAST ST. LOUIS AND CARONDELET RAILWAY COMPANY

v.

JOHN EISENTRAUT:

Filed at Mt. Vernon June 13, 1890.

WATER-COURSE—*diverting from its natural channel—liability for damages resulting.* Where a railway company diverts the flow of a water-course from its natural channel, and conducts it through a ditch to a point where it overflows the land of another, the company will be liable for such damages as result therefrom.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. W. H. SNYDER, Judge, presiding.

Mr. A. S. WILDERMAN, for the appellant:

The plaintiff's lands being lower than the lands where the water from the springs fell, and where the defendant's railroad track was situated, it was the servient heritage, and was subject to the burdens incident to that position. *Anderson v. Henderson*, 124 Ill. 164; *Groff v. Ankenbrandt*, id. 51; *Peck v. Herrington*, 109 id. 611; *Mellor v. Pilgrim*, 7 Bradw. 306; *Abbott v. Railroad Co.* 83 Mo. 271.

As a result of the foregoing, if the water from the clouds or from the bluffs at and near the Falling Springs was greater in volume at the time of extraordinary freshets than the Falling Springs branch would carry off, and it spread out upon the lands there, which were higher than the plaintiff's, and would, under such circumstances, necessarily flow in the direction of and upon the plaintiff's land, then it was surface water, and upon the facts in this case the defendant was not liable. *Kaufman v. Griesemer*, 26 Pa. St. 407; *Peck v. Herrington*, 109 Ill. 611; *Goodale v. Tuttle*, 29 N. Y. 459; *Butler v. Peck*, 16 Ohio St. 335; *Gannon v. Hargadon*, 10 Allen, 106; *Shane v. Railroad Co.* 71 Mo. 237; *McCormick v. Railroad Co.* 57 id.

Brief for the Appellee.

433; *Abbott v. Railroad Co.* 83 id. 271; *Gormley v. Sanford*, 52 Ill. 160; *Hoard v. Des Moines*, 62 Iowa, 326.

The overflow of the plaintiff's lands complained of here, was the result of an extraordinary natural event,—it was a rainfall of such magnitude and duration as to render the water which fell and accumulated, uncontrollable by either the defendant or any one else, and being so, was *vis major*. *Nugent v. Smith*, 1 C. P. Div. 423 (17 Eng. 330); *Williams v. Grant*, 1 Conn. 487; *Nitro Phosphate Co. v. London D. Co.* 9 Ch. Div. 503; *Railroad Co. v. Gilleland*, 56 Pa. St. 445; *Railroad Co. v. School District*, 96 id. 65; *Railway Co. v. Brigham*, 29 Ohio St. 374.

Mr. W. C. KUEFFNER, for the appellee:

While the owner of lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on such lower lands water that would not otherwise naturally flow in that direction. *Anderson v. Henderson*, 124 Ill. 164.

We concede the first proposition of appellant, that the servient heritage must bear the burdens incident to that position. But the burden which was thrown upon appellee's lands by appellant when it dug the ditch was not one of those incidents. Where a railroad company diverts the flow of surface water from its natural channel, and conducts it through a ditch it has made along its right of way, and empties it into a slough at a point where it overflows the land of another, the company may be liable for such damages as result from its own act. *Railroad Co. v. Glenney*, 118 Ill. 487.

A railroad company has no right, by artificial means, to obstruct the natural flow of water, and thereby force it in increased quantity upon the lands of another, and if it does so, it is liable for any injury the owner may sustain by reason thereof. *Railroad Co. v. Cox*, 91 Ill. 500; *Railroad Co. v. Morrison*, 71 id. 616.

Opinion of the Court.

The overflow of plaintiff's lands was not the result of an extraordinary natural event, but the result of the appellant's wrongful act.

Mr. JUSTICE BAILEY delivered the opinion of the Court :

This was an action on the case, brought by John Eisentraut against the East St. Louis and Carondelet Railway Company, to recover damages to the plaintiff's land and growing crops, caused by the diversion thereto by the defendant of the water from a certain natural watercourse. The declaration contains two counts, but the plaintiff, at the trial, relied and sought to recover upon the second count alone. That count alleges, in substance, that during all the month of May, 1887, and prior thereto, and from thence hitherto, the plaintiff was possessed of certain land in St. Clair county, near what is called "Falling Springs;" that there was then and there always had been a natural watercourse leading from said Falling Springs, not far from and past the plaintiff's said land, in which the water then and there naturally ran and always had been accustomed to flow; that the plaintiff was then and there cultivating his said land and raising thereon a crop of potatoes, corn and other agricultural products; that the defendant, prior thereto, to-wit, in the spring of the year 1887, unlawfully constructed a ditch from said natural watercourse, at a point close to said Falling Springs, towards the said land of the plaintiff, for the purpose of draining and diverting a part of the water which would naturally flow in said watercourse towards the said land of the plaintiff, and away from said natural watercourse; that in the month of May, 1887, while the plaintiff was the owner and possessed of said land, and was cultivating said crops thereon, heavy rains set in and a large quantity of water naturally flowed in said watercourse, and would have escaped and run off without damage to the plaintiff's said land or crops but for said ditch, but that said water was, by means of said ditch, diverted from its natural

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course and was thereby conducted toward and upon the land of the plaintiff and the crops growing thereon, by means whereof the plaintiff's said land and growing crops were greatly damaged, and said crops totally destroyed.

The defendant pleaded not guilty, and at the trial, the jury found the defendant guilty and assessed his damages at \$1000, and for that sum and costs the court, after denying the defendant's motion for a new trial, gave judgment in favor of the plaintiff. Said judgment has been affirmed by the Appellate Court on appeal, and the record is now brought here on appeal from the judgment of that court.

While the evidence given at the trial, particularly as to the sources of the water which flooded the plaintiff's land and destroyed his crops, is to a considerable degree conflicting, there was evidence tending to prove each of the several allegations of the second count of the declaration. The case made by the plaintiff's evidence is, in substance, that, at the time alleged in the declaration, the plaintiff was in possession of and cultivating a farm on what is known as the American Bottom, in St. Clair county, near the bluff, and a short distance from a large spring of water which issues from the bluff, known as Falling Springs, the water from which, prior to the construction of the defendant's railway, ran in a natural channel or watercourse and emptied into Prairie du Pont creek. In the year 1886, the defendant constructed its railway across said watercourse a short distance below said spring; and in doing so, dug a ditch along one side of its track running from said watercourse a considerable distance in the direction of the plaintiff's land, the bottom of the ditch being dug lower than the bottom of the watercourse. In the month of May, 1887, during heavy rains which then fell, large quantities of water which would, but for said ditch, have flowed and been carried off through said watercourse, were diverted therefrom by said ditch, and caused to run upon and flood the plaintiff's land, causing the damage complained of.

Opinion of the Court.

As contested questions of fact are not open for consideration here, we must assume that the case supported by the plaintiff's evidence is conclusively established. It follows that no theory as to the legal rights of the parties based upon those portions of the evidence which may have tended to disprove the case thus established are now material. We therefore pass, without comment, the elaborate argument of defendant's counsel as to the rights and burdens of dominant and servient estates in respect to the drainage of surface water not flowing in a natural watercourse, as that question is not now in the case. The second count of the declaration being proved, the rights of the plaintiff, unless there are other errors of law in the record, must depend solely upon whether the case made by that count is sufficient to warrant a recovery.

No question is now raised as to any ruling of the court during the progress of the trial or in the instructions to the jury, except the giving of the first instruction asked by the plaintiff, which was as follows:

"The court instructs the jury, that, if they believe, from the evidence, that the plaintiff has made out his case as set out in the second count of the amended declaration, then they should find for the plaintiff."

There was no error in this instruction. The sufficiency of said count follows from rules of law which have received repeated recognition by this court. Thus, in *C. & A. R. R. Co. v. Glenney*, 118 Ill. 487, we held that where a railroad company diverts the flow of surface water from its natural channel and conducts it through a ditch to a point where it overflows the land of another, it will be held liable for such damages as result therefrom. See also *J., N. W. & S. E. R. R. Co. v. Cox*, 91 Ill. 500; *T., W. & W. Ry. Co. v. Morrison*, 71 id. 616.

As no other question of law arises upon the record, the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

CHRISTIAN EBERSTEIN

v.

MARTIN WILLETS *et al.*

Filed at Ottawa June 18, 1890.

1. **COMPOUNDING A FELONY**—*deed made in pursuance thereof—bill to set aside the deed.* In order to set aside a conveyance of land on the ground it was executed to compound a felony, the bill must allege that the deed sought to be avoided was executed in consideration of an agreement not to prosecute.

2. **DURESS**—*bill to set aside deed—what questions involved.* On bill to set aside a deed on the simple ground of duress, no question of the parties being *in pari delicto* can arise, but it is only material to inquire whether the act in question was the free and voluntary act of the party seeking to set it aside, or is it one prompted by fear, to which his judgment never assented.

3. **SAME**—*laches—delay in seeking to avoid a deed.* Where a party seeks to avoid his deed in a court of equity on the ground of duress, he is required to move promptly, and must not sleep on his rights. In case of a delay on the part of the party pleading duress, clear and conclusive evidence will be required to explain the failure to proceed promptly. A delay of over three years is such *laches* as, unexplained, will bar relief in equity.

4. If one really guilty of larceny, executes a deed for land, in the expectation it will have the effect to prevent a criminal prosecution, though no promise is given, and the party, though under arrest, is allowed to see and freely consult with his wife and his attorney, and he gives possession under his deed, after release, and takes no steps to avoid it until after the statute has barred any prosecution against him, and no undue means are used to procure the deed, it will not be set aside.

5. **SAME**—*deed made under duress—not void, but voidable—ratification.* A deed obtained by duress is voidable, only,—not absolutely void; and it may not be avoided after ratification when the duress has been removed.

6. **ALLEGATIONS AND DECREE**—*must correspond.* In a court of chancery, the relief granted must be in conformity with the allegations of the bill, and it will never be granted in opposition to those allegations.

APPEAL from the Circuit Court of Cook county; the Hon. OLIVER H. HORTON, Judge, presiding.

134	101
58a	418
134	101
199	419
134	101
dl14a	256

 Brief for the Appellant.

MESSRS. MILLER, LEMAN & CHASE, and Mr. F. W. JAROS, for the appellant:

On the question of duress under imprisonment or process, see Chitty on Contracts, (11th Am. ed.) 271; *Hackett v. King*, 6 Allen, 58; *Bane v. Detrick*, 52 Ill. 19; *Duke de Cadaval v. Collens*, 4 A. & E. 858; *Severance v. Kimball*, 8 N. H. 508; *Richardson v. Duncan*, 3 id. 508; *Heckman v. Schwartz*, 20 Wis. 267; *Fay v. Oatley*, 6 id. 421; *Shaw v. Spooner*, 9 N. H. 197; *Clark v. Pomeroy*, 4 Allen, 534; *Williams v. Bailey*, L. R. 1 H. L. 200.

The principle that where the parties to an illegal transaction are *in pari delicto*, the court will not aid either party, does not apply to a case like this, where the parties are not *in pari delicto*, or where there was such imposition, oppression or duress as in this case. *Keith v. Buck*, 16 Bradw. 121; *Baehr v. Wolf*, 59 Ill. 470; *Bothwell v. Brown*, 51 id. 234; *Schommer v. Farwell*, 56 id. 542; *Williams v. Bailey*, L. R. 1 H. L. 200; *Whitmore v. Farley*, 43 L. T. (N. S.) 192; *Osbaldiston v. Simpson*, 13 Sim. 513; *Smith v. Cuff*, 6 M. & S. 160; *Smith v. Bromley*, 2 Dougl. 696; *Osborne v. Williams*, 18 Vt. 379; *Porter v. Jones*, 6 Coldw. 313; 1 Story's Eq. secs. 300, 695.

The defense of *bona fide* purchaser can not avail any of the defendants in this case, for the reason the deed from Eberstein to Martin Willets was obtained by perversion of criminal process and to compound a criminal offense, and was contrary to the Criminal Code. Rev. Stat. chap. 38, pars. 69, 183.

Paragraph 69 of the Criminal Code provides as follows: "Whoever takes money, goods, chattels, lands, or other reward or promise thereof, to compound any criminal offense, shall be fined in double the sum or value of the thing agreed for or taken; but no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense." Very plainly, this transaction, and

Briefs for the Appellees.

the obtaining of this deed from Eberstein, were contrary to the provisions of this act. *Shenk v. Phelps*, 6 Bradw. 612; *Fay v. Oatley*, 6 Wis. 42; *Bowen v. Buck*, 28 Vt. 309; *Bane v. Detrick*, 51 Ill. 19.

Paragraph 183 of the Criminal Code provides as follows: "All judgments, mortgages, assurances, bonds, notes, bills, specialties, promises, covenants, agreements, and other acts, deeds, securities or conveyances given, granted, drawn or executed contrary to the provisions of this act, may be set aside and vacated by any court of equity, upon bill filed for that purpose by the person so granting, giving, entering into or executing the same, or by his executors or administrators, or by any creditor, heir, devisee, purchaser, or other person interested therein, or, if a judgment, the same may be set aside on motion of any person aforesaid, on due notice thereof given."

Messrs. WILSON & MOORE, for the appellees Louisa Simons and Winkelman:

A contract made under duress is not void, but voidable, because it may be ratified. 1 Parsons on Contracts, 446; Wharton on Contracts, sec. 149; *Deputy v. Stapleford*, 19 Cal. 303; *Somes v. Brewer*, 2 Pick. 203.

Where the only coercion is the fear of the consequences of one's own criminal act, there is no duress. *Felton v. Gregory*, 134 Mass. 177; *Smillie v. Smith*, 34 N. J. Eq. 51.

Complainant has lost his right to relief, if he ever had any, by *laches*. *Cox v. Montgomery*, 36 Ill. 396; *Bush v. Sherman*, 80 id. 160; *Howe v. South Park Comrs.* 119 id. 117; *Hoyt v. Pawtucket Inst. for Savings*, 110 id. 390.

Mr. JESSE HOLDOM, for the appellee Newbury:

Where the party threatens nothing which he has not a legal right to perform, there is no duress. *Fellows v. School District*, 39 Me. 559; *Preston v. Boston*, 12 Pick. 14; *Atley v. Bock-hour*, 3 M. & W. 633; *Stillman v. United States*, 101 U. S. 465.

Brief for the Appellees.

A court of equity will apply the rule of *laches* according to its own idea of right and justice. *Brown v. County of Buena Vista*, 5 Otto, 559.

Imperfect rights must be asserted with vigilance. *Brobst v. Brock*, 10 Wall. 519.

Parties under no disability, who for many years sleep upon their rights, can not enforce them through a court of equity. A court of equity, acting on sound discretion, will refuse to aid a party who does not act in good faith and with reasonable diligence. *Brown v. Wathen*, 1 How. 189.

Long acquiescence and *laches* by parties out of possession can not be excused but by showing some actual hindrance or impediment of those in possession which will appeal to the conscience of the court, and especially where there is knowledge of the claim of those in possession. *Wagg v. Beird*, 7 How. 234.

So in the case at bar, Eberstein was fully cognizant of the rights of the parties in possession of this property, and as his personal friends were still tenants in possession, he could at all times have ascertained the status of the claim of title. Where a party seeks to enforce a claim in equity who has for a long time acquiesced in the assertion of adverse rights, he should set up specifically the impediment to an earlier prosecution of his suit. *Laches* and delay must be duly accounted for before equity will interpose. *Gould v. Gould*, 3 Story, 516.

Unreasonable delay on the part of the plaintiff must be accounted for by good and sufficient reasons, and not statements of imaginary difficulty or unreal obstacles. *Fisher v. Burdict*, 1 Curtis, 220.

Where one who has sufficient knowledge of the facts to put him on inquiry, permits another to hold property and create liens thereon, or superior equities in favor of innocent third parties, he must suffer the loss occasioned by his *laches*. See *Babcock v. Pettibone*, 12 Blatchf. 354; *Murphy v. Painter*, 11 Ill. 333.

Opinion of the Court.

Mr. P. L. SHERMAN, and Mr. WILLIAM B. BRADFORD, for the appellees the Willets.

Mr. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The substance of the allegations of the bill is, that the appellant was arrested by a private detective, on a warrant issued by a justice of the peace, at the instance of Henry Willets and Martin Willets, charging him with the larceny of certain carriage trimmings belonging to them, of the value of sixteen dollars, and that instead of being taken before the justice of the peace issuing the warrant, he was taken to a private room of the detective, and there detained, without bail, for two days and nights; that while thus detained in the room of the detective, his mind being so troubled by recent domestic afflictions, and he being so weak, mentally and physically, that his fears were easily operated upon, he was terrorized by being made to believe that certain innocent acts of his were incapable of explanation by him except upon the theory of his guilt, and that such acts would be given in evidence against him, and that this, with other evidence which it was represented would be produced, would be sufficient to convict him of the larceny wherewith he was charged,—that he should not be released from custody and restored to his liberty unless he would execute a deed to Martin Willets for sub-lots 4 and 5 of lot 1, in block 46, in the city of Chicago, and that he should be released from custody upon executing such deed; that he was not guilty of the crime of larceny wherewith he was charged, but being thus weak in mind, and terrorized, he had no freedom of will, and he executed the deed required in order that he might be released from arrest and restored to his liberty.

It is elementary, and we need not pause to cite authorities to sustain it, that the relief granted must be in conformity with the allegations of the bill, and that it will never be granted in opposition to those allegations. It is therefore unnecessary

Opinion of the Court.

to inquire, here, whether the evidence shows that the deed sought to be set aside was executed to compound a felony. In such case it must be alleged that a felony was committed, and that the instrument sought to be set aside was executed in consideration of an agreement not to prosecute it. (Wharton on Contracts, sec. 483; *Swope v. Jefferson Fire Ins. Co.* 93 Pa. St. 253.) In that case the question may arise whether the parties are *in pari delicto*. (*Haynes v. Rudd*, 102 N. Y. 392.) But no such question can be relevant here. Here it is only material to inquire, was the act in question the free and voluntary act of the party seeking to set it aside, or was it one prompted by fear, to which his judgment never assented. *Whitefield v. Longfellow*, 12 Me. 126; *Smilie v. Smilie*, 32 N. J. Eq. 51; *Felton v. Gregory*, 130 Mass. 177.

The evidence is sufficient to authorize the chancellor to believe, as he evidently did believe, that appellant was guilty of larceny as charged, and that the deed was freely and voluntarily executed, in the expectation that it would have the effect to cause an abandonment of the criminal prosecution. Henry and Martin Willets were, and had been for many years, engaged in the business of manufacturing carriages, in Chicago. Appellant was a carriage trimmer, and worked for them, as such, from 1858 until his arrest, in October, 1884. He was in the habit of doing work out of the usual hours of labor, both for the Willets and for other parties. For this purpose he had a shop fitted up in the basement of his residence, and to it he was accustomed to take, with the consent of the Willets, material upon which to work. Under guise of taking such material, he was, from time to time, in the habit of taking from their shop other material not needed for their work, which he worked up and sold to other parties. The Willets caused appellant to be arrested by a private detective, on a warrant issued by a justice of the peace, charging him with larceny. Mooney, the private detective, testified that he did not take appellant before the justice of the peace issuing the

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warrant, because appellant requested that he should not be; that appellant was anxious that the matter should not be made public in any way; that appellant wanted to see his lawyer and his wife, and was anxious to settle the matter with the Willets. It is true, appellant, in his testimony, contradicts this; but we hardly feel warranted in saying that the chancellor erred in believing Mooney.

Appellant's wife was brought to him soon after his arrest, remained with him as long as she desired, then went home, and returned to him the next day, with his lawyer, Mr. Burke. One of the Willets had an interview with appellant before he saw his lawyer, and it was known to appellant when his lawyer came, that claim was made on behalf of Willets that he had stolen property from them, amounting to several thousand dollars. Mr. Burke testified, among other things, that in his interview with appellant, appellant said he had not stolen so much from the Willets as they claimed; that witness replied to appellant that that would make no difference on the question of punishment, provided the amount he had stolen exceeded fifteen dollars in value; that witness also informed appellant, that if he were convicted and sent to the penitentiary, it would not prevent the Willets from proceeding against his property for the amount he had stolen from them, and that appellant then said, "Well, let the property go." The deed was acknowledged, in due form of law, before a notary public, and nothing then transpired to show that appellant was not acting voluntarily. There is no evidence that the advice given by Burke to appellant was not honestly and conscientiously given, or that any impediment then existed to a fair and legal trial, or that appellant desired such trial. The question with appellant was, seemingly, not how to get rid of that imprisonment, but how to avoid a prosecution for larceny.

When appellant was released from imprisonment, he and his family were still in possession of the property, and they remained in possession until the evening of the day after his

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release. Nothing prevented him, after his release, from retaining possession, if his deed was in fact executed under duress. He had the advice of counsel. He was then a free man. He still had his property. His possession was notice to the world of the rights that he claimed in the property, and no one could have dispossessed him against his will. His abandonment of the property could not, therefore, have been caused by duress, but was purely voluntary. Moreover, as a part of the transaction in which the deed was executed, Eberstein's wife conveyed another piece of property to a third party, to obtain money to pay Willets, leaving a balance to herself. For that balance she obtained the check of Burke for \$1000, and this check was collected by Eberstein from Burke on the day after his release. These circumstances, all taken together, may be regarded as a ratification of the execution of the deed. *Bissett v. Bissett*, 1 Har. & McH. 211. See, also, *Crowell v. Gleeson*, 10 Me. (1 Fairf.) 332; *Somes v. Brewer*, 2 Pick. 203.

But if it shall be admitted that the deed was obtained under duress, it was voidable, only,—not absolutely void. (*Deputy v. Stapleford*, 19 Cal. 302; *Bozeman v. Freeman*, 68 Ga. 278; *Rogers v. Adams*, 66 Ala. 602; *Mindery v. Whittemore*, 15 Neb. 647.) And where a party, in a suit in equity, relies upon duress as a ground for avoiding a deed, he is bound to move promptly, and must not sleep on his rights. (6 Am. and Eng. Ency. of Law, p. 88.) Where there has been a delay on the part of the party pleading duress, clear and conclusive evidence will be required to explain the failure to proceed. *Lyon v. Waldo*, 36 Mich. 343; *Hunt v. Hardwick*, 68 Ga. 100.

This deed was executed on the 17th of October, 1884. The present bill was not filed until the 11th of November, 1887. It would seem quite significant that at the last named date the bar of the Statute of Limitations had become complete as against any indictment for the larcenies wherewith appellant was charged. On the evening that appellant abandoned his property, he left Illinois for the State of Michigan, intending

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not to return, but failing to get work in that State, he returned to Chicago within about two weeks. He then acquired another home in Chicago, went to work again at his trade, purchased and paid for property, and did no act, until the filing of this bill, to disavow his deed. Meanwhile, Willets had mortgaged the property to one party to secure a debt, and sold and conveyed the fee to another, both being *bona fide* purchasers without notice of appellant's claim.

Appellant attempts to explain his delay in disavowing his deed, by his mental weakness, and his inability to employ counsel by reason of his poverty. Neither claim is made out by satisfactory evidence. It is shown that he worked at his trade continuously, earning three dollars a day; and, besides this, he or his wife had the \$1000 in money which he had collected from Burke. No instance is pretended of an attempt to employ counsel, and a failure by reason of his poverty. He and his family testify to his being in a distressed and highly excitable condition, mentally; but it is shown that he made his own contracts and purchased property, after as before the making of the deed. The fears of arrest to which they testify he was subject, seem to have lasted no longer than the period of limitation within which he could have been prosecuted for the larcenies from the Willets. We think the delay in bringing the suit inexcusable, and such as to preclude a decree cancelling the deed. *Lyon v. Waldo, supra*. See, also, *Cox v. Montgomery*, 36 Ill. 396; *Bush v. Sherman*, 80 id. 160; *Hoyt v. Pawtucket Inst. for Savings*, 110 id. 390; *Howe v. South Park Comrs.* 119 id. 117.

The decree is affirmed.

Decree affirmed.

Syllabus.

ERNEST DUNCAN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon June 13, 1890.

1. INSTRUCTIONS—*construed—on prosecution for manslaughter—self-defense—declining further combat, etc.* On the trial of one for manslaughter, the court, for the prosecution, instructed the jury as follows: "In case of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury to the person killing:" *Held*, that the instruction was not calculated to mislead, as being likely to eliminate from the consideration of the jury the theory that the defendant, although the first aggressor, subsequently declined further quarrel, and that his subsequent acts were done in self-defense.

2. SAME—*cured by a further instruction—so as to allow the theory of self-defense.* If an instruction for the People in such case is calculated to withdraw the consideration of the jury from his theory of self-defense, the giving of another instruction for the People which clearly recognizes the rule that the defendant, though the assailant in the first instance, might have retreated from that position by really and in good faith declining further combat, so as to be able to plead self-defense if the combat was afterward persisted in, will obviate all danger of misconception as to prior instructions.

3. SAME—*instruction presenting one theory—should be supplemented by the opposing theory.* Ordinarily it is not error to give an instruction embodying a correct proposition of law applicable to any tenable theory of the case, and the giving of such instruction will not usually require a reversal. If there is another theory to which this rule thus announced does not apply, it is usually the duty of the party relying upon such theory to ask the court to give such instruction as will properly present it.

4. SAME—*whether assuming the fact—as, in manslaughter—that there was a homicide—and that the accused struck the mortal blow.* An instruction on the trial of a party for manslaughter, that, "the killing being proved, the burden of proving circumstances that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the homicide," is not open to the objection that it takes from the jury the question of the killing by the

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190	4548

Brief for the Plaintiff in Error.

defendant, and excuses the prosecution from proving, in the first instance, that the homicide was unlawful, willful and felonious. It simply announces the statutory rule, that the killing of one human being by another is *prima facie* felonious, so as to throw the burden of justification or excuse on the person killing.

5. On the trial of one for manslaughter, the court instructed the jury, that if defendant brought on the conflict he could not claim the right of self-defense unless he really and in good faith abandoned the combat before the mortal blow was given: *Held*, that this instruction, standing alone, might probably to a certain degree be liable to the objection that it assumed as a fact that the mortal blow was given by the defendant; but where the following instruction submitted that question of fact fully and formally to the jury, the defect, if any, was cured or rendered harmless.

WRIT OF ERROR to the Circuit Court of Williamson county ;
the Hon. GEORGE W. YOUNG, Judge, presiding.

MESSRS. CLEMENS & WARDER, MESSRS. DUNCAN & RHEA, and
Mr. J. W. HARTWELL, for the plaintiff in error:

A party may be an assailant without striking the first blow, and under peculiar circumstances a party may strike the first blow and not be the assailant. Wharton on Crim. Law, secs. 485, 493, 603-606, 628.

The fact that the principal encounter and exchange of blows took place after defendant returned to the sidewalk, shows that whatever cutting he did was after he had clearly manifested a disposition to decline the combat. Applicable to this line of defense it was that the instructions were so prejudicial. Instruction No. 2 was as follows:

"In case of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing."

Here the jury are told, that in the case at hand there were only two avenues of escape if he did the cutting at all, and one was, that the deceased had either actually inflicted upon him a serious and highly provoking injury, or was attempting

Brief for the People.

to commit such injury on defendant. This we claim is not the law.

The People's fifth instruction is even more prejudicial. It assumes as proved the principal fact in the case,—the killing. (*Barr v. People*, 113 Ill. 473.) And the sixth instruction also assumes that defendant gave the mortal blow.

These various features running through the instructions, of taking for granted propositions that should have been left for the jury to find, are erroneous. *Roach v. People*, 77 Ill. 29; *Barr v. People*, 113 id. 473; *Town of Evans v. Dickey*, 117 id. 291; *City of Elgin v. Beckwith*, 119 id. 376; *Railroad Co. v. White*, 26 Bradw. 591; *Milling Co. v. Thomas*, 27 id. 137; *Kranz v. Theiben*, 15 id. 483; *Railroad Co. v. Warner*, 123 Ill. 49; *Jupitz v. People*, 34 id. 521; *Conkwright v. People*, 35 id. 207; *Bond v. People*, 39 id. 28; *Earll v. People*, 73 id. 334; *Weyrich v. People*, 89 id. 99.

Where there is a conflict in the evidence, the strictest accuracy is required in the instructions. *Hoge v. People*, 117 Ill. 47; *Railroad Co. v. White*, 26 Bradw. 591; *Milling Co. v. Thomas*, 27 id. 137; *Roby v. Murphy*, id. 399; *Fernandes v. McGinnis*, 25 id. 165; *Dempsey v. Bowen*, id. 192; *Railroad Co. v. Van Patten*, 74 Ill. 94.

Even where there are other instructions stating the rule of law correctly, yet the erroneous instructions can not be esteemed harmless. It is unfair to suspend the defendant's rights on the chance that as between instructions contradictory and inconsistent the jury will certainly guess the correct ones. *Railway Co. v. Snyder*, 117 Ill. 383; *Hoge v. People*, id. 48; *Carter v. Carter*, 62 id. 449; *Armstrong v. People*, 38 id. 513; *Steinmeyer v. People*, 95 id. 390.

Mr. GEORGE HUNT, Attorney General, for the People:

The instructions given comprise a full and fair statement of the law of the case, without any foundation for the complaints made.

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The first form of the instructions is a literal copy from the statute. Where an instruction states only a legal proposition, it need not make reference to the evidence. *Belt v. People*, 97 Ill. 463.

An omission in an instruction, even if error, is no ground for a reversal, if the defect is clearly supplied and corrected in others given. In such case the error works no injury. *Tomle v. Hampton*, 129 Ill. 379.

The complaint of the fifth instruction, that the clause, "the killing being proved," takes the question from the jury, and assumes that the killing has been proved, is not well taken. It is only equivalent to saying, "if the killing is proved," or, "when the killing is proved."

Complaint is made of the sixth instruction—that it assumes the mortal blow was given. If it does so assume, that is not a question about which there was any dispute or doubt. The giving of the mortal blow was proven, and substantially conceded, and there is no error in the instruction. The theory of the defense was, first, that the evidence did not warrant "the conclusion, beyond a reasonable doubt, that the defendant first struck the deceased;" and second, that if he did strike the deceased the first blow, the circumstances were such that "he could lawfully strike without incurring the responsibility of being held an assailant." Under these circumstances, even if the instruction does assume the giving of the mortal blow, there is no error which could injure the accused, and no error for which the judgment should be reversed.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

Ernest Duncan, the plaintiff in error, was indicted in the Circuit Court of Williamson county for the crime of manslaughter, and, on the trial, was convicted and sentenced to imprisonment in the penitentiary for the term of five years. The grounds upon which he now seeks to have the conviction

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set aside and to be awarded a new trial are, first, that the verdict of the jury is unsupported by the evidence, and, second, that the jury were misled by the instructions as to the law given to them by the court.

The circumstances under which the homicide was committed are briefly as follows: On the 4th day of July, 1888, at about nine or ten o'clock in the evening, George White, the deceased, in company with his brother William, left a saloon situated at the south-east corner of the public square in Marion, Williamson county, and walked along the south side of the square to South street, a street running south from a point opposite the center of the square. On the west side on South street fronting on the square, is a building known as Cantor's store, said building having also a door opening on to South street near the corner. The defendant and one Gibbs were at the time sitting in said door opening on to South street. The deceased and his brother crossed South street and halted on the corner at Cantor's store. The evidence as to what then occurred is to some degree conflicting. The night was quite dark, and the only witnesses who were upon the spot, or near enough to see what occurred with distinctness, were William White, the brother of the deceased, and Gibbs who was sitting in the door-way with the defendant.

William White testifies that he and the deceased reached the corner and halted just north of the door of Cantor's store, and that two men were sitting in the door; that one of them spoke up and said: "Where in hell are you fellows going?" and that the deceased replied: "It is none of your damned business;" that the defendant then jumped up in front of them and said that he would make it his business; that witness stepped in front of the deceased and told the defendant to "hold up;" that when he said that, the defendant struck the witness, and the witness thereupon threw up his arm and shoved or knocked the defendant off from the sidewalk into the street; that when the defendant went off from the sidewalk,

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the deceased was standing behind and north of the witness; that the defendant, on reaching the street, fell partly or entirely down, but got up immediately and returned to the sidewalk, taking a north-westerly direction so as to get onto the sidewalk north of the deceased; that immediately after reaching the sidewalk he struck the deceased a blow; that the witness, finding that he himself had been wounded, proposed to the deceased that they go to a certain drug store which was near by, saying that he thought that he had been cut; that the deceased consented, saying that he also had received a blow on his arm; that on reaching the drug store, it was found that both the witness and the deceased had been wounded, the wound of the latter being on the upper part of the left arm, and made apparently with a knife, and the knife having, as was ascertained upon subsequent examination, penetrated the bone and splintered off portions of it.

Witness Gibbs testifies that, as the deceased and his brother stopped on the corner near Cantor's store, the deceased commenced doing something which indicated that he was about to urinate; that the defendant, seeing what he was about, called out, saying: "I would not do that if I were you; you might get arrested;" that one of them, which the witness thinks was the deceased, replied: "What business is that to you, you damned son of a bitch?" that defendant jumped up and said: "You don't know who you are talking to, do you?" that at about that time William White struck the defendant and knocked him into the street, but witness admits that the first blow was struck by the defendant, although he thinks it was received by the deceased and not by his brother; that defendant returned to the sidewalk in a south-westerly direction, so as to reach the sidewalk some seven or eight feet south of the door; that the deceased and his brother had in the meantime advanced down the sidewalk so that when the defendant got back, they were all together; that several blows passed between them, and that the witness thereupon got up and inter-

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posed, saying that it was not fair for two men to be fighting one, and took hold of them and finally succeeded in parting them. This witness testifies that just before the first blow was struck, and before the defendant was knocked off the sidewalk, William White run his hand into his pocket, but there is no pretense that either he or his brother drew or had in his possession any weapon at that time.

Some other witnesses who were so far away that, owing to the darkness, they could not see the affair with distinctness, heard portions at least of the colloquy between the defendant and the deceased which immediately preceded the affray, and testified to what they heard, and their testimony as to the words used corresponds in the main with that of Gibbs. The evidence also tends to show that during the day and evening preceding the affray, the deceased was to some extent under the influence of intoxicating liquors, and also that during the day he had in his possession a revolver and a dirk knife, and also that at one time he had in his pocket and exhibited a large rock, but there is no evidence that he had either of those weapons in his possession at the time of the affray, or that the defendant had any reason to suppose that he was armed with weapons of any kind.

It appears that for several days the condition of the deceased, though considered dangerous, was such as to give promise of ultimate recovery, but that blood-poisoning afterward ensued which rendered a fatal result highly probable if not absolutely certain. As a last resort his arm was amputated, but he survived the operation but a few hours.

It can not be doubted, we think, that the evidence warranted the jury in finding that the defendant inflicted upon the deceased the wound which caused his death. This seems to be a fair conclusion to be drawn from the testimony of the witnesses on both sides. The only attempt to justify or rather to excuse the homicide is on the theory of self-defense, and while there is some evidence on which that theory may be

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based, we are of the opinion that any candid perusal of the record will produce the conviction that the defendant commenced the affray, and that he was the aggressor throughout. To state the case most strongly for the defendant, the evidence applicable to the issue of self-defense was conflicting, with at least an apparent preponderance against the defendant. Under these circumstances, unless there was error in the instructions to the jury as to the law, the verdict finding against the defendant on that issue must be held to be conclusive.

The only remaining question then is, whether there was any error in the instructions. The first instruction given at the instance of the prosecution consisted of the definition of the crime of manslaughter in the exact language of the Criminal Code. The second instruction was a literal copy of the first clause of the section of said Code defining voluntary manslaughter, viz :

"In case of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury to the person killing."

It is said that this instruction, though stating a manifestly correct proposition of law, had a tendency to mislead the jury because, as applied to this case, it was likely to eliminate from their consideration the theory that the defendant, although the first aggressor, subsequently declined further quarrel, and that his subsequent acts were done in self-defense. It is difficult to see how, if we are permitted to attribute to the jury any considerable or even an ordinary degree of intelligence, such could have been the effect of the instruction, but if the defendant's counsel were apprehensive that it might have that effect, they should have asked further instructions which would have set the jury right in the matter and rendered misconception impossible. Ordinarily it is not error to give an instruction embodying a correct proposition of law applicable to any

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tenable theory of the case, and the giving of such instruction will not usually necessitate a reversal of the judgment. If there is another theory to which the rule thus announced does not apply, it is usually the duty of the party relying upon such theory to ask the court to give such instructions as will properly present it. But in this case, the sixth instruction given at the instance of the prosecution clearly recognized the rule that the defendant, though the assailant in the first instance, might have retreated from that position by really and in good faith declining further combat, so as to be able to plead self-defense if the combat was afterwards persisted in by the other party. It would thus seem that all danger of misconception, if any such there was, was obviated by the instructions given for the prosecution.

What we have said applies also to the defendant's criticism of the fourth instruction given for the prosecution, which was merely a statement of the statutory definition of an assault, viz: "An unlawful attempt, coupled with a present ability to inflict upon the person of another a violent injury."

Objection is made to the fifth instruction for the prosecution, which was as follows:

"The killing being proved, the burden of proving circumstances that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the homicide."

It is claimed that this instruction assumed, and therefore took from the jury, the question of the killing of the deceased by the defendant, and also excused the prosecution from proving, in the first instance, that the homicide was unlawful, willful and felonious. It is clear that neither of these criticisms can be sustained. This, like the four preceding instructions, was a mere copy of a certain provision of the Criminal Code, this being in the exact language of section 155 of the act of 1874 in relation to Criminal Jurisprudence. It was, and was

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doubtless understood by the jury to be, a mere statement of an abstract legal proposition applicable alike to all prosecutions for homicide, and the words with which it begins, viz, "the killing being proved," could not have been understood as an assumption that in this case the killing had been proved, but a statement of the rule that when in any prosecution, for a homicide the killing is proved, the burden of justifying or excusing the homicide is thrown upon the accused. Nor did the instruction, in any just sense, relieve the prosecution from proving an unlawful and felonious killing. It merely announced the statutory rule, that the killing of one human being by another is *prima facie* felonious, so as to throw the burden of justification or excuse on the person killing.

The sixth and seventh instructions given for the prosecution were as follows :

"6. If you believe, from the evidence, beyond a reasonable doubt, that the defendant brought on the difficulty by first assaulting the deceased, then the defendant can not avail himself of the right of self-defense in order to shield himself from the consequences of his acts, however imminent the danger in which he may have found himself in the progress of the difficulty, unless you further believe, from the evidence, that the defendant really and in good faith, abandoned the combat before the mortal blow was struck.

"7. If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant cut the deceased, George White, in the arm with a knife, or other instrument capable of inflicting a similar wound, as charged in the indictment, it is no excuse to say that the deceased would not have died if he had taken proper care of himself, or that neglect, or the want of proper applications to the wound had brought on blood-poisoning, and of that he died, provided you believe, from the evidence, beyond a reasonable doubt, that the wound was the primary or principal cause of his death."

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It is insisted that the court, by the sixth instruction, assumed as a fact, that the mortal blow was given by the defendant, and so withdrew that question from the jury. It is probable that this instruction, standing alone, would, to a certain degree, be liable to the objection here made, but when it is read in connection with the seventh instruction which immediately follows, and in which that question is fully and formally submitted to the jury, as a question of fact to be determined by them from the evidence, there seems to be no rational ground for the supposition that the jury could have been misled as to the position of that question, or as to their duty in relation to it.

More or less fault is found with each of the remaining instructions given at the instance of the prosecution, but we do not deem it necessary to prolong this discussion further than to say, that we have carefully considered the various points made, and do not think that any one of them is tenable. We are of the opinion that the jury were instructed with substantial accuracy, and there is no ground apparent to us upon which the judgment of the Circuit Court should be disturbed.

The judgment will be affirmed.

Judgment affirmed.

134	189
40a	422
134	190
86a	651

THE CHICAGO CITY RAILWAY COMPANY

v.

LUCIEN PELLETIER.

Filed at Ottawa June 12, 1890.

1. STREET RAILWAYS—*improper conduct of passenger—as, in the use of indecent language—right of expulsion, etc.* While a conductor of a street railway car is justified in expelling a passenger for the use of vulgar and indecent language to the annoyance of other passengers, still the law does not justify unreasonable and excessive force, or permit the removal of such passenger from the car at a place or under circumstances dangerous to life or limb.

Syllabus.

2. But the conductor has no right to put a passenger off his car for the use of vulgar and indecent language in a tone loud enough to attract the attention of other passengers, and refusing to desist, unless such language is calculated to annoy and disturb them.

3. Railway companies are not conservators of the public or private morals, but they may and should adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance or annoyance. Their duty to prevent the use of offensive language on their cars is for the protection of their passengers, and arises out of their duty to passengers.

4. INSTRUCTIONS—*construed—whether liable to be understood as excluding evidence on one view of the case.* On the trial of an action against a street railway company for ejecting the plaintiff from its car, the company attempted to justify the expulsion on two grounds: the plaintiff's refusal to pay fare, and his use of language calculated to disturb other passengers. The court instructed, that even if the plaintiff did not pay his fare or some one pay it for him, and the conductor in charge of the car did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while in motion, then, etc.: *Held*, that the instruction could not have been understood as excluding from the jury the consideration of the testimony tending to show misconduct of the plaintiff calculated to disturb the other passengers, especially when the jury were told, by other instructions, that the conductor would be justified in putting the plaintiff off the car for using vulgar and indecent language loud enough to disturb other passengers.

5. PRACTICE—*improper remarks of counsel, in argument, to the jury.* A new trial will not be awarded for the improper conduct of counsel, in his argument to the jury, in stating facts not in evidence, when the trial court promptly stops the counsel and tells the jury to disregard the remarks, and properly instructs as to them, and it does not appear that the jury were influenced by such remarks.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. C. M. HARDY, for the appellant.

Mr. F. W. TOURTELLOTTÉ, for the appellee.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This was an action by appellee, against appellant, in the Superior Court of Cook county, to recover for personal injuries alleged to have been received by appellee by being forcibly ejected from the cars of appellant, and thrown violently upon the ground and under the feet of a horse, etc. A trial resulted in a verdict for appellee, assessing his damages at \$2500. Motion for a new trial was overruled, and judgment was rendered on the verdict, which judgment, on appeal to the Appellate Court, was affirmed, and the railway company prosecutes this further appeal.

The general issue was filed, and a plea justifying putting appellee from the cars, etc., which set up the rules of the company to collect fare from each passenger, and requiring the conductors not to allow any indecent language or improper conduct on appellant's cars, and if any passenger should behave with gross impropriety, or refuse to pay fare, the conductor should stop the car and eject the passenger, using no more force than was necessary, and alleging that the appellant, when, etc., refused to pay fare, and became abusive, employed profane and indecent language, and behaved otherwise with gross impropriety; that the car was filled with passengers, etc., and the conductor, while the car was standing, gently laid hands upon him and removed him, etc., using no more force than was necessary, as he lawfully might. Issue was taken upon this plea of justification, and it was upon it that the case was mainly contested.

Looking into the evidence, we find that there is a sharp conflict, and the jury would have been warranted in finding either that appellee paid his fare or refused to do so, or that he was guilty of gross impropriety, to the disturbance and annoyance of passengers on the car, or that he was not, as they gave credence to the witnesses upon the one side or the other. In this state of case, three instructions were given

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upon each side, of which no complaint is made, except as hereinafter stated. The law bearing upon the issues was given with substantial accuracy. Appellant, however, insists that the court erred in giving the first instruction in the series for appellee. It was as follows:

"1. The jury are instructed, that even if the jury believe, from the evidence, that the plaintiff did not pay his fare, or some one pay it for him, when riding on the defendant's car, and the conductor of the said defendant's car, then in charge of the car, did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while the car was in motion, and without any immediate warning, and he was injured thereby, then the defendant is liable for such injury and damage."

The criticism made is, that the instruction ignored the right of the conductor to eject appellee from the car for such misconduct as would disturb other passengers that the company was required to protect. The instruction was not directed to the right to eject appellee, but to the manner of doing it, and it could not have been understood as excluding from the jury a consideration of the testimony tending to show misconduct on his part. Other instructions told the jury that the conductor would be justified in putting appellee off the car for using vulgar and indecent language in a voice loud enough to annoy or disturb other passengers. While this would be true, the law would not justify unreasonable and excessive force, or permit his removal from the car at a place or under circumstances dangerous to his life or limb. The instruction complained of went only to that branch of the case, and correctly stated the law.

It is also urged that the court erred in modifying appellant's second instruction. This instruction told the jury, that although appellee may have paid his fare, and the conductor was mistaken about it, yet if, during the discussion, appellee used vulgar and indecent language in a tone of voice sufficiently

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loud to attract the attention of the passengers, and refused to cease the use of such language, then the conductor was justified, etc., in putting him off. The court inserted after the word "passengers" the words, "to annoy and disturb them," so that, as given, the instruction read, that if he used such language in a voice sufficiently loud "to attract the attention of the passengers and to annoy and disturb them," and refused to desist, etc., the conductor would be justified, etc. The modification was not improper. It seems to be contended that the fact that the attention of the passengers, or any number of them, was attracted by the language, whether it was calculated to annoy or disturb them or not, would justify the ejection of a passenger. Such is not the rule. Railway companies are not conservators of the public or of private morals. They may and should, in all cases, adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance or annoyance. Naturally, such rules for the protection of the passenger from the results of the conduct of others, fall into two classes,—those which relate to the safety of the passenger, and those that pertain to his comfort and convenience. Unquestionably, any conduct or any violation of a reasonable police regulation of the road, which tends to endanger the life or limb of the passenger, or in anywise put him or his property in jeopardy, may be met with such prompt action as the necessity of the case seems to require to prevent the threatened harm. The servants of the company would in such case not be required to wait, or justified in waiting, until injury was inflicted. In respect of regulations relating to the comfort and convenience of the passenger a different rule prevails. However strongly the use of indecent language in a public conveyance should be condemned, it is apparent that the use of such language attracting a few persons on the rear platform or seat might create neither annoyance nor disturbance, while the same language used at other times, in the presence of others, or under different circumstances, would be

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highly offensive, and justly subject the passenger who persists in using the same, to ejection from the car. In such case the right of the company arises from its duty to protect its passengers from annoyance and discomfort, and undoubtedly the use of profane, vulgar and indecent language, having naturally the tendency to offend and annoy other passengers upon the car, would form sufficient justification for the conductor to stop this car, and require the person offending to leave, and upon his refusal to cease its use or leave the car, to eject him.

The modification was not error, and while the instruction might very properly have been further modified by inserting the further proposition, that if appellee used the language imputed to him, in a manner that naturally tended, under the circumstances shown, to annoy or disturb other passengers, and refused to desist upon request, etc., the conductor might lawfully put him off the car, using no more force than was reasonably necessary, and having due regard to his safety from injury, yet the instruction as given, in view of the facts, was not improper.

It is also said that error intervened in consequence of the remarks of appellee's counsel to the jury. While the remarks were clearly improper, they were met by the court promptly telling the jury they must disregard them, and the court also, by an instruction, pointedly told them their duty in that regard. The court did all in its power to correct the breach of the rule which requires that counsel shall, in argument, keep within the record, except to award a new trial, or punish the attorney for contempt. We are not prepared to say, that, considering the circumstances shown in the record, the jury were or could have been influenced by the remarks of counsel complained of.

We find no substantial error in the record. The jury having found for appellee, and that finding having been approved by both the trial and Appellate Courts, must stand.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

Syllabus.

MICHAEL C. McDONALD *et al.*

v.

GEORGE D. ROSENGARTEN *et al.**Filed at Ottawa June 12, 1890.*

1. **MECHANIC'S LIEN**—*time of performance—as an element in creating the lien—as to express and implied contracts.* No lien is created by the statute under an express contract, if the time stipulated for the completion of the work or furnishing materials is beyond three years from the commencement thereof, or the time of payment is beyond one year from the time stipulated for the completion thereof. If the contract is implied, the work must be done or the materials furnished within one year from the commencement of the work or the delivery of the materials. No lien can be enforced unless the work, etc., is to be completed as required by the statute.

2. **SAME**—*statement of claim—time of filing same—requisites, etc.—as against other creditors or incumbrancers.* In order to enforce the lien as against any other creditor or incumbrancer, the party claiming the lien must file in the circuit clerk's office, within four months after the last payment shall become due, a just and true statement, account or demand due him, after allowing all credits, setting forth the times when such materials were furnished or labor performed, etc., verified by affidavit.

3. The purpose of requiring the claim to set forth "the times when such materials were furnished or labor performed," is to enable those interested to know, from the claim itself, that it is such that can be enforced, and the verification by affidavit is required as a guaranty of the truth of the claim.

4. **SAME**—*amendment of statement of claim.* Any amendment to the statement of claim would have to be attached to the original, and filed within the time provided in section 28 for the filing of the original. The language of that section is imperative.

5. **SAME**—*abstract of claim by clerk—and entry thereof—office of such entry.* The provisions of section 53 of the chapter of the Revised Statutes relating to liens, requiring the clerk to make an abstract of the claim in a book kept for that purpose, and properly indexed, containing the name of the person filing the lien, the amount of the lien, the date of filing, the name of the person against whom the lien is filed, and a description of the property charged with the lien, was not intended to take the place entirely of the claim itself, and constitute the only notice required. The only purpose of section 53 is to furnish a convenient and ample reference to the claim.

Brief for the Appellants.

6. *SAME—affidavit of claim—sufficiency.* To a claim filed for a mechanic's lien was attached this affidavit: "F. A. W., being duly sworn, says he is the authorized agent for Hall Steam and Power Pump Company; that said company has performed the labor and furnished the materials set forth in the above statement of claim for a lien, and there is now due said company from John E. Burton, for said labor and materials, after allowing all credits and set-offs, the sum of \$175, which affiant charges and alleges is a lien upon the said above described premises:" *Held*, that the affidavit was no verification of the statement of the claim.

7. The affidavit may all be true, and yet the claimant be not entitled to any lien, as it fails to give any time. It should have been that the statement of the claim was true, it being required to state the time when the material was furnished, etc. The affidavit being defective, the claimant was not entitled to the lien sought.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. EGBERT JAMIESON, Judge, presiding.

Messrs. WOOLFOLK & BROWNING, for the appellants:

As to the form of verification, if the statute does not prescribe it, or the general import of it, the better practice is, to annex a declaration under oath, to the effect that the facts stated are true; but a claim signed by the claimant, with the informal certificate, "sworn to," annexed, is sufficient. *Jones on Liens*, sec. 1452; *Gray v. Voorhis*, 8 Hun, 612; *Laswell v. Presbyterian Church*, 46 Mo. 279; *Leatherage v. Woods*, 37 Kan. 59.

Our courts have repeatedly held that technical objections to affidavits will be disregarded, even when their form is prescribed by law, and that a substantial compliance with the statute is all that is required. *Castle v. Judson*, 17 Ill. 381; *Wilborn v. Blackstone*, 41 id. 264; *Railroad Co. v. Bank*, 82 id. 493; *Brown v. Story*, 4 Metc. 318; *Houck on Mechanic's Liens*, sec. 68; *Jones on Liens*, secs. 1404, 1407.

As to the construction of mechanic's liens by our courts, see *Phillips on Mechanic's Liens*, sec. 16; *Brady v. Anderson*, 24 Ill. 111; *Phillips v. Stone*, 25 id. 77; *Rothgerber v. Dupuy*,

Briefs for the Appellees.

64 id. 452; *Huntington v. Burton*, id. 503; *Canisius v. Merrill*, 65 id. 67; *Stephens v. Holmes*, 64 id. 336; Sergeant on Mechanic's Lien Law, 37.

Mr. JAMES E. MONROE, and Mr. IRA J. GEER, for the appellees:

The claims for liens are bad for two reasons: First, they are not verified by affidavit; and second, they do not set out the times, particulars, details or items of the demand. As to the affidavit, see Phillips on Mechanic's Liens, sec. 366; *Conklin v. Wood*, 3 S. D. Smith, 662; *Keller v. Houlihan*, 32 Minn. 486; *Rugg v. Hoover*, 38 id. 404; *Meyer v. Burtandi*, 39 id. 438; *Heutig v. Sperry*, 38 Kan. 459.

The claim for a lien must be strictly pursued, and all ambiguities in it shall operate against the claimant. *Wade v. Reitz*, 18 Ind. 307; *Goss v. Strelitz*, 54 Cal. 640.

The dates of the items of the claim should be so stated as to enable parties interested to discover during what period the labor was done and the materials furnished. 2 Jones on Liens, sec. 1407.

When the statute requires the claim to state the time of doing the work or furnishing the materials, the claim must give the period during which the work was done and the materials delivered, or the lien will be defeated. *Rush v. Able*, 90 Pa. St. 153; *Valentine v. Rawson*, 57 Iowa, 179.

Not one of the claims in question shows the time during which the work was done or materials furnished, and every one, for that reason, is insufficient. The most that is shown, in any case, is the time when the work was completed. This is not sufficient. Phillips on Mechanic's Liens, sec. 359; *Lynch v. Feigle*, 11 Phil. 247.

Statutes which require the filing of a true account of the work done or materials furnished, necessarily imply an itemized or detailed statement of the transactions which are the foundation of the lien. 2 Jones on Liens, sec. 1417.

Opinion of the Court.

MR. JUSTICE SCHOLFIELD delivered the opinion of the Court:

The contest, here, is between parties claiming under a trust deed, on one side, and other parties claiming mechanics' liens, on the other side. The question to be determined is, whether the claims for mechanics' liens are made out and verified, so as to entitle them to be enforced, under the statute, as against creditors or incumbrancers.

The first section of the act entitled "Liens," provides, "that any person who shall, by contract, express or implied, or partly expressed and partly implied, with the owner of any lot or piece of land, furnish labor or materials, or services as an architect or superintendent, in building * * * any house, * * * shall have a lien," etc. And the third section provides: "When the contract is expressed, no lien shall be created, under this act, if the time stipulated for the completion of the work or furnishing materials is beyond three years from the commencement thereof, or the time of payment beyond one year from the time stipulated for the completion thereof. If the work is done or materials are furnished under an implied contract, no lien shall be had, by virtue of this act, unless the work shall be done or materials be furnished within one year from the commencement of the work or the delivery of the materials." (Rev. Stat. 1874, chap. 82, p. 665.) Time is therefore an indispensable element to be considered in the enforcement of any lien under the statute, and no lien can be enforced disregarding the terms of the statute in that respect. *Beasley v. Webster*, 64 Ill. 458; *Powell v. Webber*, 79 id. 134; *Belanger v. Hersey*, 90 id. 70.

Sections 4 and 28 of the act, as amended by an act approved May 31, 1887, read as follows:

"Sec. 4. Every creditor or contractor who wishes to avail himself of the provisions of this act, shall file with the clerk of the circuit court of the county in which the building, erection or other improvement to be charged with the lien is situated,

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a just and true statement or account or demand due him, after allowing all credits, setting forth the times when such material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by an affidavit."

"Sec. 28. No creditor shall be allowed to enforce a lien created under the provisions of this act, as against or to the prejudice of any other creditor or incumbrancer or purchaser, unless a claim for a lien shall have been filed with the clerk of the circuit court, as provided in section 4 of this act, within four months after the last payment shall have become due and payable. Suit shall be commenced within two years after filing such claim with the clerk of the circuit court, or the lien shall be vacated." Pub. Laws of 1887, p. 219.

The purpose of requiring the claim to set forth "the times when such material was furnished or labor performed," is, obviously, to enable those interested to know, from the claim itself, that it is such as can be enforced, and the verification by affidavit is required as a guaranty of the claim in this as in other respects,—and all this is, by section 28, indispensable to the enforcement of the lien against creditors and incumbrancers.

The following affidavit, appended to the claim of the Hall Steam and Power Pump Company, is, so far as the statement of performance, a copy of the affidavit appended to each of the other claims, and there is no other verification of any of the claims, to-wit:

"Frederick A. Walker, being duly sworn, says he is the duly authorized agent for Hall Steam and Power Pump Company; that said company has performed the labor and furnished the materials set forth in the above statement of claim for a lien, and there is now due said company from John E. Burton, for said labor and materials, after allowing all credits and set-offs, the sum of \$175, which affiant charges and alleges is a lien upon the said above described premises."

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Clearly, this is no verification of the statement of claim. Verification, in this connection, plainly means, certifying that the statement as made is true. (See Bouvier's Law Dic. title "Verification;" Webster's Unabridged Dic. title "Verify.") Instead of this being, as required by section 4, *supra*, a statement verified by an affidavit, it is merely an affidavit that the claimant "has performed the labor and furnished the materials," not *as* set forth, but, simply, "set forth in the above statement of claim," etc., and so may be true, whether the time when was such that the lien can not be enforced or that it can be enforced, since "performing labor or furnishing materials" are acts, merely, and mentioning them, only, is not descriptive, or suggestive of any particular time. (Phillips on Mechanics' Liens, sec. 366; *Keller v. Hanlihan*, 32 Minn. 486.) We agree with the Appellate Court that the claims are not verified as required by the act, and not being thus verified, (sec. 28, *supra*), prohibits the enforcement of the lien. See, also, *Conklin v. Wood*, 3 E. D. Smith, 662.

But counsel contend, that because it is required in section 53 of the amendatory act of 1887, that the clerk shall make an abstract of the claim in a book kept for that purpose, and properly indexed, containing the name of the person filing the lien, the amount of the lien, the date of filing, the name of the person against whom the lien is filed, and a description of the property charged with the lien, it is intended this shall take the place entirely of the claim itself, and is all the notice intended to be given the public. But this entirely ignores the provisions of section 28 of the same act, which, it has been seen, prohibits the enforcement of the lien, to the prejudice of any other creditor, incumbrancer or purchaser, "unless a claim for a lien shall have been filed with the clerk of the circuit court, as provided by section 4" of that act. It is evident that the only purpose of the requirement of section 53 is to furnish a convenient and ample reference to the claim.

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Nor do we think the claims are in anywise aided by averments in the cross-bill. The language of section 28 is imperative. Any amendment would have to be attached to the original, and filed within the time provided in that section for the filing of the original. See, also, 2 Jones on Liens, sec. 1453, *et seq.*, and authorities there cited.

An objection was urged in the argument in the Appellate Court, but it is not repeated here, to the effect that the statute does not apply to liens existing prior to the contracts under which the mechanics' liens are claimed. It has been ruled otherwise in *Shaffer v. Weed*, 3 Gilm. 511, and *Rietz v. Coyer*, 83 Ill. 29.

We find no error in the ruling below. The judgment is affirmed.

Judgment affirmed.

CRAIG and SHOPE, JJ., dissenting.

AUGUSTUS N. GAGE

v.

GEORGE A. DU PUY.

Filed at Ottawa June 12, 1890.

1. BURNT RECORDS ACT—*parties to suit—claims to be adjudicated.* In a proceeding under the Burnt Records act, all persons claiming the title or any interest in the land are required to be made parties, and they are required, by answer or otherwise, to set forth their claims of title, and to establish the same by proof; and it is made the duty of the court to adjudicate in respect to all conflicting titles or claims.

2. SAME—*defendant claiming no title—of the proper decree.* On petition under the Burnt Records act, to establish title, etc., one of the defendants pleaded the limitation under the Bankrupt law, which was held a bar to the relief sought. The other defendant set up no title, and was in no way connected with his co-defendant's superior title. The court dismissed the bill only as to the successful defendant, but held, that as against the other defendant the petitioner was the owner

134	132
144	457
144	600
134	132
44a	313
134	132
161	406
134	132
173	516
173	539

134	182
212	819

of the fee: *Held*, no error in refusing to dismiss the suit as against the defendant making no defense.

3. Where a party in a chancery proceeding under the Burnt Records act, by his petition offered to pay the defendant the moneys expended in acquiring any tax titles, if he relied on any, and they should be declared invalid, and the tax title of one defendant was held good and the other defendant showed no title of any kind, it was *held*, that the court did not err in refusing to require the petitioner to pay for tax titles not shown or not set aside.

4. ASSIGNMENT OF ERROR—*by whom*. A party will not be allowed to complain of an error that does not injuriously affect him or his interests. So where a defendant in a suit under the Burnt Records act claims no title to the premises to be affected by the decree rendered, he can not be allowed to assign for error that such decree is not broad enough to protect him.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. OLIVER H. HORTON, Judge, presiding.

Mr. GAIL E. DEMING, for the plaintiff in error:

This action is similar, in all its material features, to the case of *Gage v. McLaughlin*, 101 Ill. 155. It is not shown by the petition what the interest of the plaintiff in error is in the land.

The decree is faulty in setting aside a tax title without requiring the payment of the amount thereof, as tendered in the bill. *Gage v. Nichols*, 112 Ill. 271.

The decree sets out and alleges a title in fee superior to the title of defendant in error, yet it finds that he is the owner in fee, and that plaintiff's title is subordinate to him.

Mr. WILLIAM GIBSON, for the defendant in error:

The effect of the decree is to determine the title to the property as to all the defendants except H. H. Gage, and to vest the same in the petitioner, subject to a determination, in a court of law, of the conflicting interests of the petitioner and said H. H. Gage. *Smith v. Hutchinson*, 108 Ill. 662; *Smith v. Gage*, 11 Biss. 219.

The bill was not required to allege the defendant's title and invalidate the same. When a person is made a defendant, it

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devolves on him to establish the title he may claim. *Gage v. Caraher*, 125 Ill. 453; *Smith v. Hutchinson*, 108 id. 662; 118 id. 666; *Gage v. Du Puy*, 127 id. 221.

Mr. CHIEF JUSTICE SHOPE delivered the opinion of the Court :

The petition in this case was filed under the Burnt Records act, and conforms to the requirements of, and contains all of the averments necessary to entitle the petitioner to relief under, that act. *Smith v. Hutchinson*, 108 Ill. 662; *Gage v. Caraher*, 125 id. 447.

Henry H. Gage, co-defendant of the plaintiff in error, filed a plea setting up title in himself, and pleading the limitation created by section 5057 of the Revised Statutes of the United States. The court below entered its decree granting the prayer of the petition, notwithstanding the defense thus interposed and established by the evidence. On appeal to this court by said Henry H. Gage, the decree was reversed, and the cause remanded, with directions to the court below to dismiss the petition. We then held that the limitation prescribed by the section of the Bankrupt act before cited, and set up and relied upon in the plea, was a bar in proceedings under the Burnt Records act, and the defendant having sustained his plea, the court erred in granting the relief sought by the petition. (*Gage v. DuPuy*, 127 Ill. 216.) Upon the cause being redocketed in that court, the decree to reverse which this writ of error is prosecuted was entered, in which it is found and decreed, that by reason of the matters set up by the said Henry H. Gage in his said plea, the petitioner is barred from asserting title against the said Henry H. Gage, and from any relief against him. The court, however, by its decree, found and declared, as against all other defendants to the petition, including the present plaintiff in error, that the petitioner was the owner in fee of the premises in question, and established and confirmed the title thereto in him.

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Plaintiff in error insists, that, the plea of Henry H. Gage having been held a bar to the relief sought against said Henry H. Gage, the decree is erroneous as to him, plaintiff in error; that the circuit court should have dismissed the petition as to him, also. It is sufficient to say, that the limitation was not pleaded or relied upon by him as a defense. Nor does it appear that he in any way held under the title of Henry H. Gage. The answer of plaintiff in error was a simple traverse of the averments of the petition, and denying that the proceedings were under the Burnt Records act. It does not appear, by his answer, that he claims any title or interest in the premises whatever. Nor is any necessary connection shown between the title of Henry H. Gage and any claim, if he has any, of plaintiff in error to this property. The petition alleges, and the decree finds, that the petitioner was in possession of the premises, and it is manifest, that although he may be unable to inquire into the invalidity of the title set up by Henry H. Gage, or to question it, he would not be barred from asserting his paramount title against others not in privity with that title.

By the statute, (section 127,) the rules and regulations governing courts of chancery in this State are made to apply to proceedings under the Burnt Records act, and the court may determine the rights of the parties, and decree in favor of the better title. (78 Ill. 538, and cases *supra*.) By the 16th section of the act, (Starr & Curtis, 1996,) all persons claiming to own the premises in fee, and all persons to whom any conveyance thereof has been made and the deeds recorded since the destruction of the records, are required to be named in the petition, and are made defendants thereto. Such persons may severally file answers, setting up their claim of title, and it is made the duty of the court to adjudicate in respect of all conflicting claims.

It is said in *Smith v. Hutchinson*, *supra*, that "when a person is made defendant to a petition of this kind, it devolves upon him to establish the title he may claim to the property." In

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Gage v. Caraher, supra, it was also said: "All that is required in respect of adverse claimants and their titles is, that such claimants shall be named in the petition, and made defendants. Nothing more is required to give the court jurisdiction, under the statute, to investigate all claims of title to the premises." And so in *Gage v. Du Puy, supra*, it was held that the defendant must allege and establish his title. It follows, necessarily, that plaintiff in error, not having set up in his answer any claim of interest in or title to the premises in controversy, can not be prejudicially affected by the decree. Having no interest to be cut off or affected by the decree, he is in no position to complain. It has been so repeatedly held, in chancery as well as in common law proceedings, that a party can not complain of error that does not affect him, that citation of authority is unnecessary.

The same answer must be made to the further contention, that the court erred in not requiring the petitioner to repay plaintiff in error money supposed to have been expended in acquiring certain tax titles. It is said, that petitioner having in his petition offered to pay, should have been required to do so. The offer was, that if it was found the Gages claimed under tax titles, and the tax deeds were declared void, to pay what was equitably due therefor, etc. What tax deeds could the court have found that the plaintiff in error held, or could it have declared void? None were claimed by plaintiff in error, and, as we have seen, the petitioner was bound to do no more than make plaintiff in error a party, leaving it for him to set up, by way of answer, any claim of title he might have. It is clear that the court could not require petitioner to repay the money expended in procuring the tax titles owned by Henry H. Gage, for they were not set aside, and no others are set up or insisted upon by any one. It is no concern of the plaintiff in error that the court wrongly decreed, if his rights are not thereby prejudiced. Moreover, there is nothing in the record before us, showing, or tending to show, that at the hearing

Syllabus. Opinion of the Court.

plaintiff in error offered any evidence of title claimed by him, or that he had expended any sum of money in respect of any such title. There was, so far as shown by this record, nothing before the court from which it could have rendered a decree finding anything equitably due to plaintiff in error.

The decree of the circuit court is affirmed.

Decree affirmed.

THE AULTMAN & TAYLOR COMPANY *et al.*

v.

JOSEPH T. WEIR *et al.*

Filed at Mt. Vernon June 13, 1890.

184	187
183	180
184	187
188	614

APPEAL—as to the amount involved—with reference to the question of *jurisdiction*. The Supreme Court has no jurisdiction, by appeal or writ of error, to review the judgment of the Appellate Court affirming a decree dismissing a creditors' bill, where the judgment sought to be collected is less than \$1000; nor can the judgments of the several complainants be added together, so as to make out the sum of \$1000.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Randolph county; the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. CASE, HUDD & HOGAN, for the plaintiffs in error.

Messrs. GORDON & ALLISON, and Mr. R. J. GODDARD, for the defendants in error.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a creditors' bill, brought by the Aultman & Taylor Company, a corporation, and James Hood and Robert Hood, copartners doing business under the firm name of J. & R. Hood, against Joseph T. Wier and William Wier, to set aside

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certain conveyances and mortgages alleged to have been executed by the defendants in fraud of the complainants' rights, and to subject the property thus conveyed or mortgaged to the payment of their debts. It appears that on the 30th day of March, 1886, the Aultman & Taylor Company recovered a judgment against the defendants for the sum of \$623.08, and that on the 9th day of March, 1887, said J. & R. Hood also recovered a judgment against the defendants for \$460.39, and that executions were issued on both of said judgments and afterwards returned wholly unsatisfied. Said judgment creditors thereupon joined in the present bill, and are seeking to obtain satisfaction of their respective judgments out of the equitable assets of their debtors.

The cause was heard in the Circuit Court on pleadings and proofs, and by a decree of that court entered September 15, 1888, the bill was dismissed at the complainants' costs for want of equity. Said decree having been taken by appeal to the Appellate Court was affirmed, and to reverse the judgment of that court, the complainants have brought the record here by writ of error.

It is plain that this court has no jurisdiction. Neither the judgment in favor of the Aultman & Taylor Company nor that in favor of J. & R. Hood amounts to \$1000, and it can not therefore be said that, as to either of the complainants, the sum of \$1000 is involved in the case. Nor can their several judgments be cumulated for the purpose of making out the \$1000. *Farwell v. Becker*, 129 Ill. 261; *Piper v. Jacobson*, 98 id. 389. There being no certificate of the judges of the Appellate Court that the case involves questions of law of such importance, on account of direct or collateral interests, that it should be passed upon by this court, the writ of error must be dismissed.

Writ of error dismissed.

Syllabus.

JOHN HRONEK

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Ottawa June 12, 1890.

134	139
40	612
134	139
89a	13908

1. **STATUTES**—*title of an act—and of the subject to be expressed therein.* It is not necessary that the title of an act shall express all of the minor divisions of the general subject to which the act relates. It is sufficient if it expresses the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it. But if the title expresses such minor subdivisions which, without such expression, would be held to be included within the general subject, such expression will not render the title obnoxious to the constitutional provision.

2. **CRIMINAL LAW**—*explosives—manufacture, use, etc.—act of 1887—of the title, and the subject of the act.* The act entitled "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, is not obnoxious to section 13, article 4, of the constitution, "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title does not express two subjects, but only one, and all the provisions of the act are within the subject expressed in the title, and are germane to each other and the general scope and purpose of the act.

3. The regulation of the use of explosives necessarily implies the right to punish an improper use. Two different subjects are not included or expressed in or by the title, for the punishment of an improper use flows necessarily from the main or substantive object as stated in the title,—i. e., to regulate the use of explosives.

4. **SAME**—*use of explosives—intent—how shown—possession—declarations, etc.* On the trial of one for the manufacture, etc., of explosives with intent to take the life of another, the fact that the accused procured the explosive may be shown by proof that it was found in his possession, and the unlawful intent is manifested by the nature of the substance itself, his concealment of it, and his contemporaneous declarations of his intent.

5. Where a person is found in possession of dangerous explosives, and has avowed the intention of using them for a particular unlawful purpose, the presumption will arise that he procured the same for such unlawful use, especially when his business does not call for the use or possession of them.

Syllabus.

6. The intent of a party can ordinarily be shown only by inferences drawn from his acts and from his declarations.

7. *SAME—possession of dynamite—explanation—an instruction construed—whether excluding evidence offered in defense.* On the prosecution of one for the manufacturing, compounding, buying, selling, etc., of dynamite, with intent to destroy human life therewith, under an act that took effect on July 1, 1887, the defendant asked an instruction that to constitute the crime the acts charged should be shown to have been done after July 1, 1887. The court added this: "Therefore the jury must disregard any evidence as to the making, compounding or procuring dynamite, at C.'s house or elsewhere, prior to said date." The defendant, to account for dynamite found in his possession, testified that it was left in his house in 1886, by one K.: *Held*, that the instruction, as modified, was not calculated to take from the consideration of the jury the testimony explaining the defendant's possession of the dynamite. The instruction related solely to the elements necessary to constitute the crime charged, and had no reference to the defense.

8. *SAME—accessory.* Under a statute which provides that any person abetting or in any way assisting in certain denounced acts shall be deemed a principal, and upon conviction shall be subject to the same punishment as provided in the preceding sections relating to principals, a defendant, if guilty as an accessory before the fact, is to be indicted and punished as a principal.

9. *SAME—verdict—certainty as to party found guilty.* On a separate trial of one of several defendants, the record showed the coming of the People by the State's attorney, and J. H., (the defendant,) impleaded, etc., and the selection of the jury, and trial. The jury found "the defendant" guilty, without specifying his name: *Held*, that the verdict was not uncertain as to the party found guilty.

10. *SAME—place of imprisonment—act of 1887, to regulate manufacture, etc., of explosives—construed.* Section 1 of the act of 1887, "to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," provides that any one found guilty of the acts therein denounced "shall be deemed guilty of a felony, and upon conviction thereof shall be punished for a term not less than five years nor more than twenty-five years:" *Held*, that the imprisonment intended is imprisonment in the penitentiary.

11. *WITNESSES—competency—religious test.* Section 3, article 2, of the State constitution, has abrogated the rule which obtained prior to 1870, restricting the competency of witnesses on account of defect of religious belief, and there is no longer any test of qualification in respect to religious belief or want of the same which affects the competency of citizens to testify as witnesses in courts of justice.

12. *SAME—former decision.* The case of *Central Military Tract Railroad Co. v. Rockafellow*, 17 Ill. 541, on the competency of a witness de-

Brief for the Plaintiff in Error.

pending upon his religious belief, overruled *Noble v. People*, Beecher's Breese, 54; and section 3, article 2, of the constitution, abrogated the former rule that had obtained in this State, and there is now no religious test as to the competency of any witness.

13. *SAME—credibility—elements to be considered—detectives—police officers.* On the trial of one for crime, there is no error in refusing an instruction asked by the defense, that the evidence of private detectives and the police "should be received with a large degree of caution." All the circumstances connected with a witness, or that may tend to affect his credibility or bias his judgment, are competent to be shown, and considered by the jury in determining the weight and credit to be given to his testimony.

WRIT OF ERROR to the Criminal Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. JULIUS GOLDZIER, for the plaintiff in error:

The law under which this prosecution is based is unconstitutional and void, it being obnoxious to section 3, article 4, of the constitution. Both the title and the act itself contain more than one subject. Cooley's Const. Lim. 148; *Young v. State*, 47 Ind. 150.

The penalty part of the statute is void for uncertainty. It denounces imprisonment, without stating whether in the county jail or in the penitentiary. It is competent for the legislature to punish a misdemeanor by imprisonment in the penitentiary. *Lamkin v. People*, 94 Ill. 501; *Thomas v. People*, 113 id. 581.

If, then, it is competent for the legislature to create felonies punishable otherwise than by death and penitentiary, then, according to the rules of construction, a doubt as to the meaning of the law should be solved in the prisoner's favor. Bishop on Stat. Crimes, sec. 218; *Homer v. State*, 1 Ore. 167.

A joint indictment means a joint trial, unless the court directs otherwise. *Spies v. People*, 122 Ill. 1; *Maton v. People*, 15 id. 536.

Plaintiff in error being tried with Frank Chleboun, the verdict finding "the defendant" guilty is void for uncertainty.

 Brief for the People.

1 Bishop's Crim. Proc. sec. 1005; *Farn v. State*, 54 Ga. 249; *Lambert v. Borden*, 10 Bradw. 648.

The court, by instructing the jury to disregard any evidence as to the making, compounding or procuring of any dynamite, at Chapek's house or elsewhere, prior to July 1, 1887, deprived the prisoner of the benefit of the evidence explaining how any dynamite was left in his house prior to that date.

As to the *corpus delicti* and its proof, see Hale's Pleas of the Crown, 200; *Evans v. Evans*, 1 Hagg. Ch. 105; Burrill on Circumstantial Ev. 733; *People v. Bennett*, 49 N. Y. 143; 3 Greenleaf on Evidence, sec. 131; *Ruloff v. People*, 18 N. Y. 179; *Smith's case*, 21 Gratt. 819; *Lynn v. State*, 5 Humph. 83; *Bergen v. People*, 17 Ill. 426; Bishop on Crim. Evidence, sec. 632.

Chleboun, not believing in a future state of existence and future rewards and punishment, was not a competent witness. Starkie on Evidence, 30; Taylor on Evidence, 1177; 1 Greenleaf on Evidence, sec. 368; *Railroad Co. v. Rockafellow*, 17 Ill. 553; *Jackson v. Gridley*, 18 Johns. 103.

Mr. GEORGE HUNT, Attorney General, for the People:

The act does not embrace more than one subject. The general subject is explosives, and that is expressed. Only the general subject of the act is required to be expressed in the title. *Mix v. Railroad Co.* 116 Ill. 502; *Abington v. Cabeen*, 106 id. 200; *People v. Hazelwood*, 116 id. 319; *Montclair v. Ramsdell*, 107 U. S. 147; *People v. Brislin*, 80 Ill. 423; *Timm v. Harrison*, 109 id. 593; *Burke v. Monroe County*, 77 id. 610; *Plummer v. People*, 74 id. 361.

The general purpose of a constitutional provision is accomplished when a law has but one general object, which is fairly indicated by its title. Cooley's Const. Lim. (1st ed.) 144; *People v. Mahoney*, 13 Mich. 495.

As to cases having a bearing on constitutional questions, see *Insurance Co. v. Mayor*, 8 N. Y. 253; *Billings v. Mayor*,

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68 id. 413; *People v. Commissioners*, 47 id. 501; *Menendorff v. Duryea*, 69 id. 557; *Fuller v. People*, 92 Ill. 182; *Magner v. People*, 97 id. 320; *Cole v. Hall*, 103 id. 30; *Prescott v. Chicago*, 60 id. 121; *Potwin v. Johnson*, 108 id. 71; *O'Leary v. Cook County*, 28 id. 534; *Neifing v. Pontiac*, 56 id. 172; *Johnson v. People*, 83 id. 431; *Timm v. Harrison*, 109 id. 593; *Hawthorn v. People*, id. 302; *Larned v. Tiernan*, 110 id. 173; *Fuller v. People*, 92 id. 182; *People v. Wright*, 70 id. 389; *Blake v. People*, 109 id. 173.

The statute is not void for uncertainty as to the punishment, as the crime is made a felony, which is punishable by death, or imprisonment in the penitentiary.

The record, taken together, shows that plaintiff in error was the only person tried, and there is no uncertainty about the matter.

There is no error in the record, and the verdict was amply justified, if the jury believed the witnesses for the People.

MR. JUSTICE BAKER delivered the opinion of the Court:

The plaintiff in error, John Hronek, was indicted, with Frank Chapek, Frank Chleboun and Rudolph Sevic, for violation of an act of the legislature of this State, entitled "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, and in force July 1, 1887. The first count charged the defendants with unlawfully making dynamite, with the unlawful intention of destroying the lives of certain persons therein named, and in the five remaining counts the defendants were charged successively in such several counts with manufacturing, compounding, buying, selling and procuring dynamite, with the same unlawful purpose and intent. The defendant Hronek was alone put upon trial, and that trial resulted in a verdict of guilty, and fixing his punishment at twelve years' imprisonment in the penitentiary. Motions

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for a new trial and in arrest of judgment were severally overruled, and the said defendant was sentenced on the verdict. Numerous grounds are urged for reversal, which we shall consider substantially in the order they are made.

It is insisted that the statute upon which the prosecution is based is unconstitutional, in that it is obnoxious to section 13, of article 4, of the constitution of the State, which provides, "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The specific objection is made, that two distinct subjects are expressed in the title. That objection is without merit. The act is entitled, "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same." The regulation of the use necessarily implies the right to punish an improper use. To "regulate," means to adjust by rule or regulation, and any attempt to fix rules for the manufacture, transportation, use and sale of explosives that did not also prescribe punishment for violation of such rules and regulations, would necessarily be imperfect. Two different subjects are not included or expressed in or by the title, for the punishment of an improper use flows necessarily and legitimately from the main or substantive object as stated in the title, i. e., to regulate the use, etc., of explosives. It is not necessary that the title shall express all of the minor divisions of the general subject to which the act relates, and it is sufficient if it express the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it. But if the title expresses such minor subdivisions which, without such expression, would be held to be included within the general subject, such expression will not render the title obnoxious to the constitutional provision. *Plummer v. People*, 74 Ill. 361; *Fuller v. People*, 92 id. 182; *Magner v. People*, 97 id. 320; *Cole et al. v. Hall*, 103 id. 30; *Prescott v. City of Chicago*, 60 id. 121; *Potwin v. Johnson*, 108 id. 71; *Timm v. Harrison*, 109 id. 593; *Hawthorn v. People*,

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id. 302; *People v. Wright*, 70 id. 389; *City of Virden v. Allan*, 107 id. 505.

The contention that the statute itself treats of two separate and well defined subjects is not tenable. It is said that the first three sections of the act relate to the "manufacture and use of explosives for illegal purposes," while the four remaining sections relate to "the manufacturing, sale and transportation of explosives for legitimate purposes." It is therefore claimed that the former should properly be found in the Criminal Code, and are not germane to the other sections of the act, which are mere police regulations. The general subject of the statute is the manufacture, transportation, use and sale of explosives, and it can not be said, because one section provides for a license or permit to be obtained for their manufacture, and another prohibits the storing of explosives within a certain distance of inhabited dwellings, and another punishes fraudulent acts to procure the transportation of explosives in public conveyances, that still another section or other sections making it unlawful to manufacture or procure such explosives with the intent to use the same for unlawful destruction of life or property, and affixing a penalty therefor, would not be within the same general subject of legislation. It can no more be said that the prohibition, under a penalty, against storing explosives in dangerous proximity to a dwelling, is a police regulation, than that a like prohibition against manufacturing or procuring the same for an unlawful use or purpose is a police regulation. All of the provisions of the act are within the subject expressed in the title, and are germane to each other and to the general scope and purpose of the act.

It is next claimed, that the sections of the statute under which this indictment was prosecuted are not sufficiently definite to authorize imprisonment in the penitentiary. Section 1 of the act provides, that whoever shall be guilty of the acts therein denounced, "shall be deemed guilty of a felony, and upon conviction thereof shall be punished by imprisonment for

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a term of not less than five years nor more than twenty-five years." It is urged, that as it is not stated the imprisonment shall be in the penitentiary, and the statute is highly penal, and requires strict construction, a sentence thereunder to the penitentiary can not be sustained. We are not prepared to adopt this view. The offense is by the act declared to be a felony. A felony is by the Criminal Code of the State declared to be an offense punishable by death or confinement in the penitentiary. While the legislature undoubtedly may provide for the punishment of misdemeanors by imprisonment in the penitentiary, and undoubtedly might, if they saw proper, punish felonies otherwise than by imprisonment in the penitentiary, yet there is nothing in these sections of the act which indicates an intention to do the latter. Applying the well known rule that a criminal statute is to be strictly construed, and that nothing is to be taken by intendment or implication against the accused beyond the literal and obvious meaning of the statute, it is nevertheless clear, we think, when this statute is considered in connection with the general Criminal Code, which it must be presumed the legislature had in contemplation when passing it, the punishment to be inflicted for violation of said sections of the act is by imprisonment in the penitentiary.

It is insisted that the verdict is void for uncertainty, in that it simply finds "the defendant" guilty, without specifying the plaintiff in error by name. Before plaintiff in error was put upon trial a separate trial had been awarded to the defendants Chapek and Sevic. The defendant Chleboun was not put upon trial, but was used as a witness on behalf of the People. The record shows that on the 26th day of November, 1888, at the term of the Criminal Court then being held, the following proceedings were had and entered of record, to-wit:

"The People of the State of Illinois v. John Hronek, impl., etc.:

"This day come the said People, by Joel M. Longenecker, State's attorney; and the said defendant, as well in his own

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proper person as by his counsel, also comes. And now, issue being joined, it is ordered that a jury come," etc. (Then follows the impaneling of a jury.)

It is manifest from the foregoing, that no one was put upon trial other than the defendant Hronek, and the verdict finding "the defendant" guilty could not refer to any other defendant. There was no uncertainty in the verdict.

Complaint is made of the second instruction given on behalf of the People. That instruction told the jury that any person abetting or assisting in the perpetration of the offense mentioned in section 1 of the act, was, upon conviction, to be punished as provided in said first section. This was not error. The statute provides that any person abetting or in any way assisting in making, manufacturing, buying, procuring, etc., such explosives, etc., knowing or having reason to believe that the same are intended to be used by any person or persons, in any way, for the unlawful injury to or destruction of life or property, shall be deemed principal, and upon conviction shall be subject to the same punishment as provided in section 1 of the act. Under this statute, a defendant, if guilty as an accessory before the fact, is to be indicted and punished as principal. In view of the evidence tending to show the connection of plaintiff in error with the other defendants in the perpetration of the offense, the instruction was entirely proper.

It is objected that the court erred in refusing an instruction that the evidence of private detectives and of the police "should be received with a large degree of caution." This instruction does not contain a correct proposition of law. All the circumstances connected with a witness, or that might tend to affect his credibility or bias his judgment, are competent to be shown to and considered by the jury in determining the weight and credit to be given to his testimony. In view of the facts and circumstances thus shown, it is for the jury to determine its weight as matter of fact.

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It is urged that the court erred in modifying an instruction asked by the defendant. The instruction, as asked, was as follows:

"The jury are instructed, that to constitute the crime charged against the defendant in the indictment, two things are necessary, namely: First, the making, manufacturing, compounding, buying, selling or disposing of the dynamite, or some portion thereof, described in the indictment, on or subsequent to the first day of July, A. D. 1887."

To this the court added the following: "Therefore the jury must disregard any evidence as to the making or compounding or procuring of any dynamite, at Chapek's house or elsewhere, prior to said date." The instruction then proceeds: "Second," etc.

Hronek's defense, in part, consisted in accounting for the dynamite found in his possession by testifying that it was left in his house in the fall of 1886 by one Karafiat, and it became important for the jury to consider testimony tending to show that he was in possession of dynamite in the spring of 1887, prior to the law under which he was prosecuted going into effect, on the first day of July of that year. It is insisted that the effect of the modification was to take from the consideration of the jury this evidence, offered by the defendant, of prior possession of the explosives. It is conceded that such was not the purpose, and it is clear to us that such was not the effect, of the modification. The instruction related solely to the elements necessary to constitute the crime charged. The jury were told, that to constitute the crime it was necessary that the making, etc., of the dynamite must have been on or subsequent to the first day of July, 1887, and that therefore the jury must disregard the making or procuring, etc., prior to that date. It must be presumed that the jury were men of reasonable intelligence, and would understand that what followed the introductory part of the instruction related to what was necessary to constitute the crime, and not to the defense

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set up, that the dynamite was in possession of the defendant prior to the date fixed by the instruction. Moreover, the jury, by a lengthy series of instructions, were fairly instructed as to the law of the case, fully as favorably to the defendant as he could rightfully ask. They were told that they must consider all the facts and circumstances proven, and determine therefrom whether the defendant procured, etc., the explosives in question after the law went into force, and that his possession prior thereto would raise no presumption of guilt. It is, we think, impossible that the jury could have been misled, to the prejudice of the plaintiff in error, by the modification. It is not contended that the instruction, when considered as defining what would constitute guilt of the crime charged, and what the jury might properly consider in respect thereof, is not a substantially accurate statement of the law. As the jury were not misled by the modification, to the prejudice of the plaintiff in error, he has no cause of complaint.

Objection is made to the competency of Frank Chleboun, a witness for the People, who was permitted to testify, over the objection of the defendant. He was examined upon his *voir dire*, and avowed his belief in the existence of God and "a hereafter;" that he believed if he swore falsely he would be punished under the criminal laws of the State; that he had never thought seriously of whether God would punish him, either in this world or the next, and had never considered the question whether he would be punished for false swearing in any other way than by that inflicted by the law. He had, it seems, no religious belief or conviction of his accountability to the Supreme Being, either in this world or in any after life. The test of the competency of a witness in respect to religious belief, as generally held, is, does the witness believe in God, and that He will punish him if he swears falsely. It is stated by Rapalje, in his Law of Witnesses, (sec. 11,) that "the great weight of authority, in this country, now is, that it is immaterial whether the witness believes God's vengeance will over-

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take him before or after death." This doctrine was approved in *Central Military Tract Railroad Co. v. Rockafellow*, 17 Ill. 541, where, after a consideration of the authorities, it was held that all persons are competent to be sworn as witnesses who believe there is a God, and that He will punish them, either in this world or in the next, if they swear falsely; and that a want of such belief rendered them incompetent to take an oath as witnesses. This case, seemingly, overruled the doctrine of the earlier case of *Noble v. The People*, Beecher's Breese, 54. Without pausing here to determine whether the court erred in subjecting the witness to an examination touching his religious belief, (Rapalje on Witnesses, sec. 12, and cases cited,) it may be said that the better practice, and that which now prevails, forbids the examination of the witness in respect thereof on his *voir dire*. If there was error in this regard it was committed at the instance of the defendant, and in his interest, and he can not complain.

Returning to the question of the competency of the witness, the rule seems to be as above stated, unless changed by constitutional provision or legislative enactment. The tendency of modern times, by the courts and in legislation, is towards liberalizing the rule, and in many jurisdictions incompetency for the want of religious belief has been abolished. See Rapalje on Witnesses, sec. 13; Wharton on Evidence, sec. 395.

Has the rule announced by this court in *Central Military Tract Railroad Co. v. Rockafellow*, been changed in this State? By section 3 of article 2 of the constitution of 1870, it would seem that a radical change was effected in respect to the matter under consideration. This section guarantees non-interference of the State with the religious faith of its citizens. In *Chase v. Cheney*, 58 Ill. 509, it was said: "The only exception to uncontrolled liberty is, that acts of licentiousness shall not be excused, and practices inconsistent with the peace and safety of the State shall not be justified." The section provides: "No person shall be denied any civil or political

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right, privilege or capacity on account of his religious opinions ; but the liberty of conscience hereby secured shall not be construed to dispense with oaths or affirmations, excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of the State." No religious belief is required to qualify a citizen to take an oath, and no citizen can be excused from taking an oath or affirmation because of his religious belief. The liberty of conscience secured by the constitution is not to be construed as dispensing with oaths or affirmations in cases where the same are required by law. No man, because of his religious belief, is to be held to be excused from taking the prescribed oath of office before entering upon the discharge of the public duty ; nor can he be permitted to testify, because of such religious belief or opinion, except upon taking the oath or making the affirmation required by law. Now, as before the adoption of this provision, oaths are to be taken and affirmations made whenever required by law, but the right to take such oath or make such affirmation, if such right be a civil right, privilege or capacity, can not be denied to any citizen.

It is said, that one who holds proscribed religious opinions is incompetent,—that is, has not the legal capacity to testify. The incapacity, if it exists, grows out of and is based upon his failure to hold certain religious beliefs and opinions in accord with the prevailing religious opinions of the people, and the contention is, that he should not, by reason of such incapacity, be permitted to testify, however great and important the interest at stake to himself, his family, his neighbor, or the State. It is clear, from the authorities, that the rule contended for does not apply when the witness is testifying in his own behalf ; but if the life, liberty, reputation or property of his family or neighbor be involved, or his testimony be necessary to the protection of society, he is, under such rule, to be excluded from the privilege of testifying in courts of justice because of such incapacity. If it exists at all, the incapacity is created

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by law, and it is therefore a civil incapacity. The constitution provides that no person shall be denied any civil or political right, privilege or capacity on account of his religious opinions. In Bouvier's Law Dictionary, capacity is defined to be "ability; power; qualification or competency of persons, natural or artificial, for the performance of civil acts depending on their state and condition as defined or fixed by law." It is also defined as follows: "power; competency; qualification; ability; power or qualification to do certain acts." Am. and Eng. Ency. of Law.

The obvious meaning of the provision in the constitution is, that whatever civil rights, privileges or capacities belong to or are enjoyed by citizens generally, shall not be taken from or denied to any person on account of his religious opinions. As said by the Court of Appeals of Kentucky, in construing a similar provision of the constitution of that State, in *Bush v. Commonwealth*, 80 Ky. 244: "It is a declaration of an absolute equality, which is violated when one class of citizens is held to have the civil capacity to testify in a court of justice because they entertain certain opinions in regard to religion, while another class is denied to possess that capacity because they do not conform to the prescribed belief." It is manifest, that if the legislature may prescribe the test of belief in rewards and punishments, they may impose any other test or qualification that, in the judgment of those entertaining the dominant belief, may be necessary to afford the requisite sanction. In *Perry's case*, 3 Gratt. 632, a like conclusion was reached in construing a constitutional provision that "all men shall be free to profess, and, by argument, maintain, their opinions in matters of religion; and the same shall in nowise affect, diminish or enlarge their civil capacities."

We are of the opinion that the effect of this constitutional provision is to abrogate the rule which obtained in this State prior to the constitution of 1870, and that there is no longer any test or qualification in respect to religious opinion or be-

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lief, or want of the same, which affects the competency of citizens to testify as witnesses in courts of justice. It follows, that there was no error in permitting the witness to testify.

The only remaining question which we deem it necessary to consider, is the claim that the evidence is insufficient to warrant a conviction. It is insisted that there is no proof of the *corpus delicti*. The *corpus delicti* of the offense charged in the indictment is the making, procuring, etc., of dynamite, with intent to use the same for the unlawful destruction of the lives of the persons named in the indictment. At the time of the arrest of plaintiff in error a large quantity of dynamite and a number of bombs, of different make and material, were found in his possession. It was proved that he said, as indicating his intent, that he must kill Gary, Grinnell and Bonfield, and that he would throw the bombs at them. In his statement made to the officers after his arrest, which was reduced to writing, and which he introduced in evidence at the trial, it appears that he went with Chleboun and Chapek to Aldine Square, for the purpose of finding Grinnell's residence, and that the intent of his companions, as expressed at the time, was to find Grinnell's house, and that they were talking of killing Bonfield. It appears, also, that he pointed out to said persons Grinnell's house, or what he thought to be his house. It is also shown that on different occasions he threatened to take the lives of the three persons named in the indictment, and said that he would throw the bombs at them in the court rooms, or on the street, or wherever he might meet them. Indeed, it is not questioned that there is sufficient evidence of the intent of plaintiff in error to destroy the lives of said persons by means of such explosives, if it was believed by the jury to be true.

It is insisted, however, that there can be no presumption that Hronek had procured the dynamite with the unlawful intent indicated, from the fact that such dynamite was found in his possession. Where a party is found in possession of

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explosives, and has the avowed intention of using them for a particular purpose, the presumption would arise that he procured the same for such unlawful use. It is to be remarked, that there was nothing in the business or vocation of Hronek that would call for or require the use or possession of explosives. Moreover, it was shown by the witness Chleboun that he was at Hronek's house the last Sunday in May, 1888, when Hronek showed him some unfilled bombs, and Hronek then said that he would get dynamite with which to load them. He at that time spoke of an opportunity he had to kill Bonfield; that he did not do it because he did not have the necessary weapon, but that he regretted it very much. The witness saw no dynamite that day. In June following, the witness again saw Hronek, at his request, and Hronek had a number of bombs which were charged. Some of them had fuses attached, and others had fulminating caps. Can it be questioned, that if no explanation had been offered by Hronek as to when and how he came into the possession of the dynamite, the fact of its being in his possession in the month of June, with the avowed intent of using it in the particular unlawful way charged, coupled with his declaration, in May, that he would procure dynamite for the accomplishment of such unlawful purpose, would be sufficient to maintain a conviction for unlawfully procuring the explosive with the intent to use the same? In other words, would not the jury be justified in finding therefrom that the *corpus delicti* had been proved? The fact that he procured the explosive is shown by his having it in his possession. The unlawful intent is manifested by the character of the substance itself, his concealment of it, and his contemporaneous declarations of his intent. A jury, from the necessity of the case, must be allowed to draw conclusions from the facts proved, and intent can ordinarily be shown only by inferences drawn from the acts of the party and from his declarations. Hronek is here shown to have been in the actual possession of the dynamite in June, 1888, and subsequently,

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by unquestioned evidence, and the fact of his intention is shown by his declarations and acts. If, from the facts proved, the conclusion is irresistible, if the testimony is believed, that the offense was committed, then the *corpus delicti* is established.

Some question is made in respect of the evidence of the date when the dynamite was procured by Hronek. He testified, that one Karafiat left it at his house in the fall of 1886, and had never called for it. Without entering into a discussion of the evidence, it must be said that there was much in his own testimony, as there was also in the testimony of the witness Chleboun, that tended to discredit his evidence. The question was fully and fairly submitted to the jury as to whether or not he procured the dynamite, with the unlawful intent charged, after the first day of July, 1887, when the statute went into effect. They were told, in numerous instructions, that unless they believed, from the evidence, beyond a reasonable doubt, that he procured the same with the specific intent charged, on or subsequent to that date, they must acquit. Without extending this opinion, already too long, by an analysis of the evidence, it must suffice for us to say, that we have carefully considered the record and the facts and circumstances proved, and are unable to say that the jury were palpably wrong in the conclusion reached by them. It is not enough that we, sitting as a jury, might have found differently. They saw the witnesses, had means of determining their credibility which we do not possess, and before we would be justified in setting aside their verdict for error in finding of fact, the error must be palpable.

Other minor objections are urged, which we have carefully considered, and there is no reversible error in them, and no good purpose would be served, either to the defendant or the profession, by their discussion.

We find no error in this record for which the judgment of the court below should be reversed, and it is accordingly affirmed.

Judgment affirmed.

GEORGE W. McKENZIE

v.

ANGENETT ELLIOTT.

Filed at Ottawa June 12, 1890.

1. **EASEMENT**—*by prescription—right of way for an alley.* An easement in land may be acquired by an uninterrupted and adverse enjoyment for a period of twenty years. So where a party purchased a lot of ground upon the assurance that a strip sixteen feet wide should be left as an alley adjoining the lot, which strip was then staked off, and the purchaser erected buildings and fences on the line of the lot with reference to the alley, and used and improved such strip under claim of right for more than twenty years, it was *held*, that such purchaser acquired a right of way over the alley by prescription.

2. While it is true that a private right of way can not be gained by the parol agreement of him who creates it, yet when, under such agreement, the way has been used for twenty years with the acquiescence of the owner, a prescriptive right to the same will thereby be gained. That the use began by permission will not affect the prescriptive right, if the other requisites exist.

3. It is not necessary that the party claiming an easement or right of way shall be the only one who can or may enjoy that or a similar right over the same land, but his right should not depend for its enjoyment upon a similar right in others. He must exercise it under some claim existing in his favor, independently of all others.

WRIT OF ERROR to the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

Messrs. HILL & HAVEN, for the plaintiff in error:

A conveyance by metes and bounds conveys only the land described and then existing easements. A new and original way can not be created across another's land by parol grant. Washburn on Easements, sec. 2, pp. 12, 13; *Grant v. Chase*, 17 Mass. 443; *Russell v. Scott*, 9 Cow. 279; *Duinneen v. Rich*, 22 Wis. 550.

A dedication is properly only to the public use. There can be no parol dedication, properly speaking, to private uses.

Brief for the Plaintiff in Error.

A private pass-way can not be created by parol dedication. Washburn on Easements, sec. 5, pl. 7, 7a; *Hall v. McLeod*, 2 Metc. 98; *Wilder v. St. Paul*, 2 Minn. 208; *Forbes v. Balenseifer*, 74 Ill. 184; *Insurance Co. v. Littlefield*, 67 id. 368.

A private way over another's land may be created by express grant, by reservation of such a right in a deed, and by prescription, but not by mere license or verbal consent. See Washburn on Easements, secs. 3, 4, 5; *Forbes v. Balenseifer*, 74 Ill. 183; *Insurance Co. v. Littlefield*, 67 id. 368.

But under section 3 of our statute concerning plats, premises intended for any street, alley-way, common, or other use, may be dedicated to either public or private use by such plat. Rev. Stat. 1874, chap. 109, sec. 3; *Smith v. Heath*, 102 Ill. 130; *Kuecken v. Voltz*, 110 id. 264; *Clarke v. Gaffney*, 116 id. 362; *Cihak v. Klekr*, 117 id. 643.

To constitute an easement by prescription, the use and enjoyment of what is claimed must have been adverse, under a claim of right, exclusive, continuous and uninterrupted, or the use must have been definite, both as to manner and locality. It must have continued for the whole period, without interruption. It must have been accompanied by a claim of right adverse to the owner of the land, and not have been under lease and license of the owner, for if the claim has been in subordination to the right of the owner, a grant could not be presumed. Washburn on Easements, sec. 4, pl. 26, p. 86; *Railway Co. v. Hoag*, 90 Ill. 348; *Dexter v. Tree*, 117 id. 532.

A mere permissive use of the land of another for half a century confers no right of continued enjoyment. So long as it is merely permissive it confers no right, but the proprietor can prohibit its use, or discontinue it altogether, at his pleasure. *Hall v. McLeod*, 2 Metc. 102; *City of Quincy v. Jones*, 76 Ill. 232; *Dexter v. Tree*, 117 id. 532.

A mere parol license to enter upon, use and enjoy the land of another, is within the Statute of Frauds, and can not be enforced in equity, even after the expenditure of large sums

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of money on the strength of such license, and the land owner will not be estopped, in equity, from revoking such license and reclaiming the land. *Woodward v. Seely*, 11 Ill. 157; *Nat. Stock Yards v. Ferry Co.* 112 id. 384.

Mr. C. W. BROWN, and Mr. FRED BENNITT, for the defendant in error.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court :

This is a bill filed on February 26, 1887, in the Circuit Court of Will County by the defendant in error against the plaintiff in error to enjoin the latter from obstructing an alley lying east of the former's homestead lot, and from interfering with her use of said alley. The cause was heard upon bill, answer, replications and proofs taken, and a decree was rendered on January 7, 1889, finding the issues in favor of the complainant. A writ of error has been sued out from this Court for the review of said decree.

Complainant's lot has a frontage of forty feet on the South side of Washington Street in Joliet and a depth of one hundred and thirty feet. She bought the lot in the summer or fall of 1865 from one Frederick Gritzner, who then owned all of block 5 in the Canal Trustees' subdivision of W. $\frac{1}{2}$ Sec. 15, Town. 35, N. R. 10 E. of 3d P. M. except a portion thereof that had been sold to one Howk. Gritzner executed to her a deed, dated April 2, 1866, conveying the lot by the following description: commencing at a point 99 feet west from the N. E. corner of said block 5, thence running 130 feet south, thence west 40 feet, thence north 130 feet, thence east 40 feet to the place of beginning, in said block 5, etc.

In April, 1875, Charles F. Gritzner, the son of Frederick, and three other persons, who owned certain lots in said block 5, executed, and recorded in the recorder's office of Will County, a certain plat showing the location of the lot and alley in question, a portion of which plat is as follows :

[illegible]

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The strip of land alleged to be an alley is sixteen feet wide and one hundred and thirty feet deep, and lies directly east of complainant's lot and between her lot and that of Howk, the latter having a frontage of 82.50 feet on the north and converging to a point on the south, so as to have the form of the letter V.

We do not deem it necessary to go into an extended analysis of the evidence. We think that defendant has acquired a right of way over, or an easement in, the strip of land on the east side of her lot by prescription. She was in the continuous and uninterrupted use of it for more than twenty years before filing her bill, and such use was adverse. We have held that an easement in land may be acquired by an uninterrupted and adverse enjoyment for a period of twenty years. (*Vail et al. v. Mix*, 74 Ill. 127; *C. & N. W. Ry. Co. v. Hoag*, 90 id. 339; *Totel v. Bonnefoy*, 123 id. 653).

When defendant in error made her purchase, she desired a lot that should extend up to the west line of Howk's lot, but was told by Gritzner that she could not do so, because the strip sixteen feet wide west of the Howk lot was to be reserved for an alley. In 1865 and 1866 and thereafter, there was a fence on the west side of Howk's lot running the length of the alley on the east. Gritzner himself measured the lot of defendant in error and the alley, and placed a stake on the east side of the alley and another on the west side of her lot. In the fall of 1865, defendant in error moved a house upon the lot, the east side of the house being on the west line of the strip in question. She also built a barn on the south part of the lot and a shed just north of the barn. Doors opened upon the alley in the east ends of both the barn and the shed. There were stone walls under the dwelling house, and there was an opening from the alley into the coal cellar under the house. The husband of defendant in error was a teamster, and the lot was useless to them without access to the rear through the

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alley. Except through the alley the barn and wagon shed could not be reached, nor could coal be put into the coal cellar.

The house was burned down in 1872, but was rebuilt without delay, the eastern end of the new house resting upon the west line of the strip and containing an opening into the coal cellar as was the case with the old house. As soon as defendant in error bought the lot, she built a bridge over the ditch on the south side of Washington Street, so that the alley could be entered from the street, and her husband graded and filled the alley so as to make it fit for use. She and her husband lived upon this lot and used the alley for putting coal into the cellar, and as an approach to the barn and wagon shed in the rear, from the fall of 1865 until January 3, 1887, when her husband died. Their use of the strip during this period of time is proven beyond question and is not denied by plaintiff in error.

It is said that the defendant in error used the alley by permission of the owners, and therefore that her possession was not adverse. The testimony shows that the defendant in error would not have bought the lot without the use of the alley; that such use was a part of the consideration for the purchase, and that both Frederick Gritzner and his son Charles told her the strip was to be kept open as an alley. They and their grantees acquiesced in her use of it for more than twenty years. We cannot see that the use was any more permissive than if there had been a written grant of the easement. It is true that a right of way cannot be gained by the parol agreement of him who creates it, but where, under such agreement, the way has been used for twenty years with the acquiescence of the owner, a prescriptive right to the same has been thereby gained. "It is no objection to gaining an easement by prescription that the same was originally granted or bargained for by parol. That the use began by permission does not affect the prescriptive right, if it has been used and exercised for the requisite period, under a claim of right on the part of the owner of the dominant tenement. Land itself may be gained

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in that way as well as an easement in it." (Washburn's Easements & Servitudes, (4th ed.) page 154, sec. 28).

On November 6, 1872, Frederick Gritzner conveyed to his son Charles all of said block 5 except what he had previously sold to defendant in error and to Hawk and to three other persons. On August 8, 1881, Charles Gritzner made a contract in writing with one Fitch for the sale to him of lot 4 of the subdivision made as above stated in April, 1875. Fitch assigned this contract to McKenzie, the plaintiff in error, and afterwards on September 11, 1885, Charles Gritzner made a deed of said lot 4 to plaintiff in error.

As we understand the plat of 1875, lot 4 includes the piece of ground 39 feet wide on the north and 106 feet wide on the south, which lies to the west of the lot of defendant in error, but it seems to be doubtful whether the strip in question, 16 feet wide and to the east of her lot, is intended to be represented as a part of lot four. The word, "alley," is not marked on the strip, but there is a cross at the foot of it on the east side, and its position on the plat would seem to indicate that the makers of the plat intended to designate the strip as an alley. A lot only 16 feet wide can be of little use.

But, however this may be, we think that Charles Gritzner had full notice of the right of way of defendant in error over the strip. He negotiated the sale of the lot for his father to Mrs. Elliott. He says in his testimony that the strip was to be reserved for an alley when she bought her lot, and that she was so informed when she made her purchase. He speaks of some arrangement that was to be made with other lot-owners in block 5 for the extension of the alley at some time in the future through the part of lot 4 lying south of Mrs. Elliott's lot to Marion Street on the south, and states that, when such extension should be made, the alley as extended would become open to the use of the public. But Mrs. Elliott's right of way over the strip was not lessened, because she did not oppose the arrangement in question. Such extension, however, was

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never made; the alley never became a public one, and her use of it continued for twenty years, and more.

Nor can her rights be affected by the fact that the alley was occasionally used by Howk, whose ground abutted upon the east side of the alley, and by Fitch & McKenzie, who were partners in the coal business having their office on the north side of Washington Street nearly opposite the entrance to the alley, and whose teams were in the habit of going through the alley to the part of lot 4 lying south of defendant in error. "It would seem that it is not necessary that the one who claims the easement should be the only one who can or may enjoy that or a similar right over the same land, but that his right should not depend for its enjoyment upon a similar right in others, and that he may exercise it under some claim existing in his favor, independent of all others." (Washburn's Easements and Servitudes (4th ed.) page 164, sec. 44). (Id. pages 165, 166 and sec. 46).

Fitch and plaintiff in error had full notice as early as 1880 of the rights of defendant in error in the strip in question. Their place of business was so located that they could easily see the alley and observe the daily use of it by defendant in error and her husband. They sold coal to her, and their teams delivered coal into the coal cellar under her house by hauling it through the alley to the opening in the east side of the house. They knew that the alley was her only approach to the barn and shed in the rear. The strip was enclosed on the east by a fence and on the west by the house, barn, shed and fence of the defendant in error, and had been filled in with gravel and other material to a depth of eighteen inches, so as to constitute a travelled road way. These circumstances indicated so clearly its use as an alley, that notice of such use was furnished by a casual glance at its appearance and surroundings.

Plaintiff in error sought to show, upon the trial of the cause, that before the expiration of the twenty years and after his purchase of lot 4 in 1885, he had given Mrs. Elliott notice that

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she could no longer use the strip without paying for it. It is not pretended that he gave any such notice in person, but that he did so through one Kaiser, a driver of one of his coal wagons. After a careful examination of Kaiser's evidence we are satisfied that he did not inform Mrs. Elliott of the objections of plaintiff in error to her use of the alley until after the death of Mr. Elliott, which occurred on January 3, 1887, and consequently after the period of twenty years had elapsed.

Some testimony was also introduced with a view of showing that the use of the alley was interrupted during the running of the twenty years, so as to prevent any prescriptive right from accruing. We think the testimony so introduced was insufficient for the purpose intended by it. For instance, Fitch or McKenzie at one time piled some wood in the alley near the north end of it and just south of the entrance to it from Washington Street. The evidence of Kaiser shows that the wood was on the east side of the alley, leaving a space of twelve feet on the west side of it, so that Elliott could easily pass it with his team in going to his barn in the rear. The fact, that defendant in error did not insist upon the immediate removal of the wood when it could be so easily passed, did not operate as a waiver in any way of her right to an easement in the strip in question.

Plaintiff in error showed Mrs. Elliott, upon her cross-examination, a letter purporting to have been written by her to "Mr. Gritzner." The letter bears no date. It is not certain whether it was addressed to the elder Gritzner or his son. It is said to have been delivered to Charles in 1873, but it speaks of a sale of the part of lot 4 lying South of Mrs. Elliott's lot, and there was no sale of such part by Charles Gritzner until 1881. Neither Charles Gritzner nor the plaintiff in error says anything about the letter in his testimony. It is said that in this letter defendant in error proposed to buy the strip of ground of Gritzner, and that, by making such proposition, she admitted Gritzner's right to sell the strip and thereby divert

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it from its use as an alley. We do not think the letter is capable of any such construction. She swears that what she proposed to buy was not the alley, but the fraction of lot 4 lying south of her lot. She is confirmed by the language of the letter, wherein she says: "I have learnt that you had sole *your land back of us*; now you know that I tole when you sole it and did not need a alley, that I would buy *what was left*."

Her own testimony and that of Charles Gritzner show that the words, "did not need a alley," refer to the contemplated extension of the alley on the east side of her lot southward to Marion Street. Such extension would necessarily take a strip sixteen feet wide from the east side of the fraction of lot 4 south of her lot. The proof shows that Gritzner had had much trouble with the lot owners about the opening of the alley, and had failed to consummate it. Inasmuch as the idea of taking a part of said fraction of lot 4 for an alley seemed to be abandoned, Mrs. Elliott proposed to buy such fraction of lot 4, but her proposition by no means included the strip of land east of her lot.

We find no error in the action of the court below. The decree of the Circuit Court is accordingly affirmed.

Decree affirmed.

HUBERT KUENSTER

v.

THE BOARD OF EDUCATION.

Filed at Mt. Vernon April 22, 1890.

1. SCHOOLS—*general School law of 1872—effect upon special acts.* The object in the passage of the School law of 1872 was to establish one general system under which all the schools in the State might be conducted, except where schools were conducted under special acts in cities having less than one hundred thousand inhabitants, or incorpo-

134 165
175 17

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rated towns, townships or districts. Such special acts were not repealed or changed by the general law.

2. *SAME—certificate of qualification—whether necessary—in order to teacher's pay.* Section 52 of the School act, which prohibits the paying of any teacher not having a certificate to teach before his employment, out of any school moneys, has application only to those school districts which are acting under the general law. It does not apply to boards of education elected under section 80 of the act. Such boards are expressly authorized to examine teachers, and to fix the amount of their salaries.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Monroe county.

MESSRS. WINKELMAN & MORRISON, for the appellant.

Mr. J. W. RICKERT, and Mr. E. P. SLATE, for the appellee.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was a bill brought by Hubert Kuenster, to enjoin the board of education of district No. 3, town 2, south, range 10, west, in Monroe county, from drawing an order on the township treasurer to pay J. F. Wexford, a teacher, for his services, and to restrain the treasurer from paying any money to Wexford, as teacher, for the board.

The district in which the board of education was duly elected contained more than two thousand inhabitants. Wexford had been examined by the board of education as to his qualification as a teacher, and found qualified. After such examination he was employed by the board to teach in the public schools, and he had discharged his duties to the entire satisfaction of the board. But it is insisted that Wexford can not lawfully receive pay for his services, because he had received no certificate of qualification from the county superintendent of schools, as required by section 50 of "An act to establish and maintain a system of free schools," and that in pursuance of section 52 of the same act, he was not entitled to draw any portion of the school fund in payment for his services.

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In 1872 the legislature passed an act entitled "An act to establish and maintain a system of free schools," which was approved April 1, 1872, and went into force on the first day of July following. The act contained ninety-eight sections. All acts inconsistent therewith, and all general school laws of the State, were, upon the passage of that act, repealed. The object of the legislature in the passage of the act, as appears from its various provisions, was to establish one general system, under which all the schools in the State might be conducted, except where schools were conducted under special acts, in cities having less than one hundred thousand inhabitants, or incorporated towns, townships or districts. Such special acts were not repealed or changed in any respect by the general law. Under section 23 of the act, each congressional township is established a township for school purposes, the business of the township to be transacted by three trustees, to be elected by the legal voters of the township. Under section 33 it is the duty of the trustees to lay off the township into school districts, to suit the wishes and convenience of a majority of the inhabitants of the township. Three directors are required to be elected in each district, and under section 48 "the directors of each district are made a body politic and corporate, by the name of School Directors of District No. . . ., township No. . . ., county of, and State of Illinois." In this section the duties and powers of the directors are also specified. Section 50 provides that no teacher shall be authorized to teach a common school, under the provisions of the act, who does not possess certain specified qualifications, and it is made the duty of the county superintendent to grant certificates to such persons as may, upon due examination, be found to possess the necessary qualifications. Section 52 provides: "No teacher shall be entitled to any portion of the common school or township fund, or other public fund, or be employed to teach any school under the control of any board of directors of any school district in the State, who shall not,

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at the time of his employment, have a certificate of qualification, obtained under the provisions of this act." Then follow various sections relating to the keeping of schedules by teachers, township treasurer, township and county school funds, common school funds, compensation of officers, liability of officers, etc., until section 79 is reached. The different sections of the act preceding this section seem to establish a complete system for the government of all school districts established in townships, except school districts having not less than two thousand inhabitants, and not governed by any special act, and except, also, schools in cities having less than one hundred thousand inhabitants, organized and conducted under special acts, and schools in incorporated towns, townships or districts organized and conducted under special acts, and except schools in cities having a population exceeding one hundred thousand; and sections 79 and 80 seem to have been enacted to make other and different provisions in the excepted cases above enumerated. Section 79 declared, that "this act shall not be so construed as to repeal or change, in any respect, any special acts in relation to schools in cities having less than one hundred thousand inhabitants, or incorporated towns, townships or districts." Section 80 provides: "Incorporated cities and villages, except such as now have charge and control of free schools by special acts, shall be and remain parts of the school townships in which they are respectively situated, and be subject to the general provisions of the School law, except as otherwise provided in this section. In all school districts having a population of not less than two thousand inhabitants, and not governed by any special act in relation to free schools now in force, there shall be elected, instead of the directors provided for by law in other districts, a board of education, to consist of six members. * * * Such board shall have power, and it shall be their duty, in addition to or inclusive of the powers and duties of school directors: First, to establish and support free schools not less than six nor more

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than ten months in each year; * * * sixth, to examine and employ teachers, and fix the amount of their salaries." The section contains other provisions, but as they relate to subjects not connected with the question involved, it will not be necessary to refer to them.

It is apparent that if the school in question was under the control of a board of school directors, then, under section 52, the teacher could not be paid from the common school fund unless he had been examined by and received a certificate from the county superintendent, as contended by appellant. But the plain answer to the position assumed is, that the school involved in this proceeding is not one falling under that section of the law, but, on the other hand, it is a school in a school district with a population of not less than two thousand, and not governed by any special act. As to a school of this character, under the terms of section 80 a board of education is elected to manage and control the school in lieu of a board of directors, and this board of education has been clothed with powers not conferred upon a board of school directors. Under the express terms of clause 6 of section 80, the board of education is clothed with the power to examine teachers. The language is, "to examine and employ teachers, and fix the amount of their salaries." The meaning of this clause is obvious. The examination required is as to moral character, and the qualification to teach the different branches required to be taught. This was the view of the statute entertained by the Appellate Court, and we think it correct.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

THE WEST CHICAGO PARK COMMISSIONERS

v.

JAMES C. McMULLEN *et al.**Filed at Ottawa October 31, 1890.*

1. **GENERAL LAW**—*as distinguished from local or special legislation.* The fact that an act is applicable only to the conditions existing in a single city in the State will not necessarily render it local or special legislation. A law may be general, and yet be operative in a single place. It is not requisite that it should be presently applicable to every person or to every city within the State.

2. **PARKS**—*act of 1879—giving control over streets leading to public parks—whether a special or local law.* The act of 1879, entitled "An act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks," etc., is not a local or special law, within the constitutional provision prohibiting the passage of local or special laws "incorporating cities, towns and villages, or changing or amending the charter of any town, city or village." The act applies to all cities where the conditions exist which it is designed to affect.

3. **SAME—streets leading to parks—power of commissioners—a continuing one.** The power given to park commissioners by the act of 1879, "to connect any public park, boulevard or driveway under its control, with any part of an incorporated city, town or village, by selecting and taking any connecting street or streets, or parts thereof, leading to such park, provided," etc., is not exhausted by one exercise of it, but is a continuing power, and the commissioners may select a street a second time, even though the street last taken runs parallel with the one first taken. They may select such connection between a park and the city as the public convenience may demand.

4. **SAME—park districts—as quasi municipal corporations—and subject to legislative control.** A park district, when established by a vote of the people, becomes a *quasi* municipal corporation for certain purposes, after which the corporation is subject to legislative control. Its powers may be changed, abridged or enlarged, over any portion of the territory within the original limits of the district, without any further vote of the people.

5. So on the adoption of the West Chicago Park act by a vote of the people included in the park district, such district thereby became a *quasi* municipal corporation for park purposes, and the board of park commissioners created by such act became the corporate officers there-

134	170
144	508
134	170
147	538
148	68

134	170
150	524
151	677
134	170
166	510
134	170
176	25

184	170
201	407

184	170
204	1 84

184	170
215	885

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of, and one of the agencies of the State for carrying on the government in respect to the parks in such district.

6. *STREETS—legislative control.* A city holds its streets for the public,—not for its citizens only, but the entire public, of which the legislature is the representative; and where no private right is invaded, the legislature may vacate a street or highway, or abridge or limit its use, in its discretion.

APPEAL from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Mr. FRANCIS A. RIDDLE, and Mr. JNO. N. JEWETT, for the appellant:

Appellant has full authority to exercise the powers complained of, by virtue of the act of 1879. The word "any," in the act, means "every." *Dubuque Co. v. Railroad Co.* 4 Green, 4; *McComas v. Amos*, 29 Md. 141; *In re Stiles' Appeal*, 41 Conn. 329; *City Bank v. Young*, 43 N. H. 459; *Davidson v. Dallas*, 8 Cal. 239; *Logan v. Small*, 43 Mo. 254; *People v. Clark*, 7 N. Y. 390; *People v. Hoffman*, 116 Ill. 587.

The act of 1871, and the acts amendatory thereof, confer a like power on the appellant.

Statutes on like subject matter indicate that the power of appellant authorizes the acts complained of.

Mr. FRANCIS ADAMS, also for the appellant:

Appellant had authority to take West Jackson street as a street connecting a part of the city with the park. 2 Starr & Curtis' Stat. 1715; 3 id. 413.

Messrs. SMITH & PENCE, for the appellee.

Mr. JUSTICE SHORE delivered the opinion of the Court:

By the legislation of A. D. 1869, known as the "Park acts," the park system of the city of Chicago was inaugurated, and three park districts, respectively called Lincoln, South and West Chicago park districts, were established, under the con-

trol of boards of park commissioners, whose powers and duties were defined. The act relating to the West Chicago park district authorized the West Chicago Park Commissioners to select and take lands for three parks within such district, and for boulevards or pleasureways, running from the river on the north to the canal on the south, and connecting such parks. (1 Private Laws of 1869, p. 342.) By this act, and a supplemental act passed at the same session, (id. 354,) the northerly and southerly range of the parks, and their maximum area, were fixed. Three parks were located in pursuance of the act, called Humboldt, Central (now Garfield) and Douglas parks, and a boulevard connecting them was established, as contemplated by said acts. The West Park act was submitted to and adopted by a vote of the people residing within the territory of which the park district was composed, and the district became thereby a *quasi* municipal corporation for park purposes; and the board of park commissioners created by such act became the corporate officers thereof, and one of the agencies of the State for carrying on government in respect of the parks within said West Chicago park district. *The People v. Salomon*, 51 Ill. 37; *Wilcox v. The People*, 90 id. 192.

In *Kreigh v. City of Chicago*, 86 Ill. 411, (decided in 1877,) it was determined that under the then existing legislation, the city, being vested with the control of the streets for the benefit of the people at large, could not transfer them to the park commissioners, or absolve itself from the duty of maintaining the same, nor was there power, under the laws then in force, for such commissioners to take or control such streets. At the next session of the legislature an act was passed, entitled "An act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks, to pay for the improvement thereof, and in that behalf to make and collect a special assessment, or special tax on contiguous property." The first section provided as follows:

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"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly, That every board of park commissioners shall have power to connect any public park, boulevard or driveway under its control, with any part of any incorporated city, town or village, by selecting and taking any connecting street or streets, or parts thereof, leading to such park: Provided, that the streets so selected and taken, so far as taken, shall lie within the district or territory the property of which shall be taxable for the maintenance of such park: And provided further, that the consent of the corporate authorities having control of any such street or streets, so far as selected and taken, and also the consent, in writing, of the owners of a majority of the frontage of the lots and lands abutting on such street or streets, so far as taken, shall be first obtained: And provided further, that such connection or improvement shall embrace only such street or streets as are necessary to form one continuous improvement.*"

Section 2 authorizes the levy of taxes and assessments to improve and maintain such streets. By section 3 such park boards are given the same power and control over the streets and parts of streets taken under the act, as they are vested with in respect of the parks and boulevards under their control. Section 5 confers power upon towns, villages and cities to invest such park boards "with the right to control, improve and maintain any of the streets of such city, town or village," for the purpose of carrying out the provisions of the act. (Act of April 9, 1879.) By the act of June 27, 1885, the first section of the act of 1879 was amended, by giving power to the commissioners "to accept and add to any such park, any street or part thereof which adjoins and runs parallel with any boundary line of the same," and by striking out the last proviso of said section.

In the year 1880, in conformity with the original act, the West Chicago Park Commissioners acquired control of West Washington street, and converted it into a boulevard, con-

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necting Garfield Park with the city. Subsequently to the conversion of Washington street into such boulevard, by and with the consent of the city, and of the owners of a majority of the frontage thereon, in writing, the park commissioners accepted and assumed control of West Jackson street, in Chicago, from Halsted street to said park, for the purpose of converting it into a boulevard, also connecting Garfield Park with the city. The present bill was brought by appellees, on behalf of themselves and other tax-payers in the town of West Chicago, etc., against the West Chicago Park Commissioners, and prayed for a decree "perpetually enjoining said West Chicago Park Commissioners from paying any moneys for the support of police officers or other employes employed upon the line of West Jackson street, from Halsted street to Garfield Park, and from incurring any debt with respect to the control, management or maintenance of Jackson boulevard, so called, and from preventing general traffic to be carried on along the line of said Jackson boulevard, so called." It is averred and shown that the park commissioners had placed their police in charge of the street, caused its employes to sprinkle and clean the same, and have been and are proposing to pay therefor out of moneys raised by taxation, and have extended the ordinances of said district concerning boulevards, including an ordinance excluding traffic wagons and teams therefrom, over said portion of said street.

No substantial objection is made to the proceedings by which the park commissioners sought to take such portion of Jackson street, if the act referred to is valid, and the power of the park commissioners was not exhausted in the taking and acceptance of Washington street as a boulevard. It is urged, however, that the act is invalid, first, because in violation of article 4, section 22, of the constitution of the State; and second, because the act was not submitted to and adopted by a vote of the people.

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The provision of the constitution which it is said this act violates, provides, "that the General Assembly shall not pass local or special laws * * * incorporating cities, towns and villages, or changing or amending the charter of any town, city or village." It is said that the act authorizes a certain class of cities to divest themselves of the control of their streets; that it relates only to those cities having parks under control of park commissioners, and not to all of such cities, for the reason that it is optional with the city to avail of the provisions of the act or not, and the act is therefore unconstitutional. We do not concur in this view. The act applies to all cities in the State having parks under the control of park commissioners. The law confers the power upon the city authorities to consent, and the park commissioners, upon securing the requisite consent, to assume control of streets, in every place within the State where the conditions exist which it was intended to affect. In *The People ex rel. v. Walsh et al.* 96 Ill. 232, it was held that this act of 1879 supplied the necessary legislation to enable the city to invest the park commissioners with control of its streets for park and boulevard purposes. The court, in that case, after stating that it was held in the *Kreigh case, supra*, that the act of 1874 had no reference to the acquisition of control of established streets of the city by the park commissioners for boulevard purposes, says: "What was there held to be wanting, we have here; and the question is not, have the city and the commissioners power, under the statute,—but, was it competent for the legislature to enact the statute conferring the power upon the city and park commissioners." The validity of the act was thus presented and sustained, and the right of the park commissioners to assume control of the street, upon having obtained the consent of the city authorities and the consent of the majority of the owners of the frontage thereon, was upheld under the act in question.

It would seem that there could no longer be any question of the constitutionality of the act. But it is insisted that the

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point was not made in argument or considered by the court in that case. We will not pause to determine whether such was the fact or not. If it be true, as suggested, that the act is applicable to the conditions existing in a single city in the State, that fact does not necessarily render it local or special legislation. It is general in its terms, and applies to all cities of the State which, at the time of its passage, had parks under the control of park commissioners, or that might at any time thereafter so have parks. If, because only a single city had such parks, an act general in its application to all cities would be local or special legislation, no valid act could be passed affecting such existing parks; and it would necessarily result from such holding, that substantially all of the park legislation enacted since the adoption of the present constitution should for the same reason have been held invalid.

An examination of the various park acts (Rev. Stat. chap. 105,) will show that they are equally obnoxious to the objection being considered as the act of 1879; yet the constitutionality of these acts has been repeatedly affirmed by this court. In *The People v. Cooper*, 83 Ill. 585, relied upon by counsel, the "City Tax act" was held to be invalid, as establishing dissimilarity in the powers and modes of different cities in the levy and collection of taxes. By that act an option was conferred on the city to levy and collect its taxes by the officers created by that act, or by those provided in and by the general law, and they might change from one to the other at pleasure. No such condition exists here, and the *Cooper* case can therefore have no application.

A law may be general, and yet be operative in a single place. It is not requisite that it should be presently applicable to every person, or to every city, within the State. The general law for the incorporation of cities, towns and villages, until it was adopted by some city, town or village, was inoperative, having no application anywhere. Upon its adoption by a single city it became operative therein, and created, in a sense,

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dissimilarity in the organization of that city from every other; and to-day only a portion of the cities of the State have adopted that act, yet it is settled that the act is not in violation of the constitution. So the City Election law, held in *The People v. Hoffman*, 116 Ill. 587, to be a valid enactment, applies only to such cities as may adopt the mode of conducting elections therein prescribed. We are not required, by any means, to go to the same length to hold the act under consideration valid. The dissimilarity sought to be avoided, it must be apparent, is not such as will arise by reason of one city having a power to appropriate such of its streets as the public welfare may demand, for pleasureways, under the control of park commissioners, and another city, for the reason that it has no parks, not having such power. As well might it be urged that so much of the City and Village act as authorizes cities, towns and villages "to erect and keep in repair public landing places, wharves, docks and levees," and the like provisions, are invalid, because inapplicable to many, if not to the great majority, of the cities, towns and villages of the State.

It is also insisted, that as the effect of the act is to extend the jurisdiction of the park commissioners over streets connecting the parks with the city not included in the original park acts when adopted by the people, it is necessary to its validity that the consent of the people to be taxed for the improvement and maintenance of such street as a boulevard be first obtained. It is settled by repeated decisions of this court, that the park commissioners are a municipal corporation, vested with power of government, and are agencies of the State for governmental purposes in respect of such parks within their respective park districts. (*The People ex rel. v. Salomon*, *supra*; *The People ex rel. v. Williams*, 51 Ill. 63; *South Park Comrs. v. Dunlevy*, 91 id. 49; *Wilcox v. The People*, 90 id. 192; *The People ex rel. v. Walsh*, *supra*.) We said in *The People ex rel. v. Brislin*, *supra*: "The park district, when established in pursuance of the act creating it, became a municipality for certain

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purposes, and, as such, came within the domain of legislation. The powers of the corporate authorities of this municipality are subservient to the legislative power, precisely as in the case of other municipalities, and are not interfered with by the present constitution."

The consent of the people required is consent to the creation of the new proposed municipality. When such municipality is established, within the general purposes of its creation, and within the territory consenting, it becomes a creature of legislative control, and, with the single exception of the saving of private right, the legislature may, in respect of such agency, as with other municipalities, repeal the law of its creation, curtail its powers, or extend them, within the prescribed territory, at will. By adopting the Park act, the people to be affected have consented to the creation of this municipality, and invested it with governmental powers in respect of parks within the district, and the park commissioners have thereby become, as said in *Wilcox et al. v. The People, supra*, "agents, by whom, in part, the people of the State carry on government. Their functions are essentially political, and concern the State at large, although they are to be discharged within the town of West Chicago." If the question was an open one, which, as we have seen, it is not, we should have no hesitation in deciding that it is competent for the legislature, within the original park district, to alter, contract or enlarge the power to be exercised by the park commissioners over any portion of the territory within the original limits of the park district. The city of Chicago holds its streets for the use of the public,—not for its citizens only, but the entire public, of which the legislature is the representative; and when no private right is invaded, the law is well settled that the legislature may vacate a street or highway, abridge or limit its use, in its discretion.

The principal point made, however, seems to be, that appellant, having exercised the power given it by the statute, by selecting and taking West Washington street, its power is

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thereby exhausted, and thereafter no street or part of a street could be taken for the purpose of connecting the park with the city or any other part of the city. The power to take streets connecting parks with the city is expressly given, subject only to the consent of the city and of the owners of a majority of the frontage thereon. Appellees, however, contend that the provision of the act, that a street or streets may be taken to connect the park "with *any* part of *any* incorporated city," etc., means some one part or point in such city, only. To so hold would be to adopt a narrow and strict rule of construction. Its effect would be to limit the benefits of the boulevard to one single locality—to some one part of the city—regardless of the public necessity. The language of the statute giving the park board the power "to connect *any* public park, boulevard or driveway under its control, with *any* part of *any* incorporated city, town or village, by selecting and taking *any* connecting street or streets, or parts thereof, leading to such park," very clearly indicates that more than one connection might be made between the park and the city. Any connecting street or streets, or parts of streets, might be taken to connect the park with *any* part of *any* incorporated city. The word "*any*," as applied to the parks under the control of the park commissioners, can not be construed as limiting the power to connect by a street or streets only one park with the city, but it is apparent that the power to connect *any* parks under their control was intended to mean, all parks under their control might be so connected. So, also, the language employed, that they may connect with "*any* incorporated city," does not mean with one incorporated city, necessarily, but was intended to apply to all cities having a park or parks within their territorial limits. So we think, the word "*any*," as used in the sentence, "with any part of any incorporated city," was intended to confer power to connect the parks under such control with such parts of the city as the public convenience might demand. The word "*any*" is used in the second sense given by Worcester and Webster,—

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i. e., "some; * * * an indefinite number or quantity." The rapid growth of the city of Chicago, for whose benefit, in common with the other cities of the State, this act was passed, would naturally suggest that a demand for increased facilities to reach these places of public resort would be required, and the legislature, comprehending the public necessity in that behalf, unquestionably sought, by the language here employed, to invest the park commissioners with power to accommodate the public needs and convenience, by authorizing them, from time to time, within the territorial limits of their jurisdiction, to take such streets as might be necessary to that end. We are of opinion that the grant of power to take any street or streets connecting any park under the control of the park commissioners with any part of the city, was intended to be a continuing power, to be exercised as the public convenience and necessity should demand. *Chicago, Burlington and Quincy Railroad Co. v. Wilson*, 17 Ill. 123.

The first section of the act of 1879 contained the proviso, "that such connection or improvement shall embrace only such street or streets as are necessary to form *one* continuous improvement." It might, under that proviso, be urged, that as the street or streets taken should only be such as were "necessary to form one continuous improvement," the legislature had in contemplation a single continuous connection. This proviso was repealed by the amendatory act of 1885, and the restriction thereby created, if one was created, was removed. It can not be doubted that the legislature intended by such repeal to remove any and all restrictions that might have arisen upon the construction of the proviso, and to prevent controversy in respect of the right of the commissioners to make connection between the park and the city. We do not find it necessary to further consider the effect of the repeal of such proviso. The power to make connections, by means of boulevards, between the city and park, must still be by such streets or parts of streets as will connect the park with some part of

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the city by some continuous route or connection. After the selection and taking of the street, the burden of improving and keeping it in repair devolves upon the park district, and it might well be that too heavy a burden would be imposed by a selection of all the streets necessary to a proper connection of the park with the city, at one time. And if power is given to the park commissioners to connect the park with any part of the city, there is nothing in the statute, nor is any reason perceived, why the selection of streets for that purpose should not be made from time to time, as the public necessity may require.

It is urged that the power thus conferred may be abused. This may have been a good reason why the power should not have been conferred at all, or if conferred, why it should have been properly guarded, but is not pertinent as showing that the power was not in fact given. The legislature has provided safeguards against the abuse, by placing the power in the hands of a local municipality, to which the persons interested and to be affected have given their consent, and requiring the consent of the city, the officers of which are elected by and responsible to the people, and likewise the consent of a majority of the owners of the frontage on the street proposed to be converted, before the power shall be exercised. These were regarded by the law-making power as sufficient, and when these prerequisites are conformed to, the power is vested in and may be exercised by the municipality.

It is also insisted that this connection is not with another "*part*" of the city than that with which the park is already connected by Washington boulevard. Jackson street is the fourth street south of Washington boulevard. We can not judicially say that Jackson boulevard will form a connection of the park with the same part of the city that is now connected by Washington boulevard. The authority conferred upon the park commissioners is, in the respect being considered, political in its nature, to be exercised in their discretion.

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Courts of equity will not inquire into, or attempt to control the exercise of, such power, except to preserve private right, or prevent gross abuse of it.

It is also urged that the ordinance by which it is sought to take Jackson street is void, and the park commissioners should not be permitted to control and maintain the same as a boulevard, for the reason that thereby the ordinance of the park commissioners excluding traffic wagons and teams therefrom is extended over Jackson street, and it is said that such exclusion is illegal. It will be time enough to determine the validity of that ordinance when some person claiming to be injured by it, or proceeded against under it, shall present the question for determination. There is no pretense that the complainants, here, are thereby deprived of any right or subjected to any burden or penalty.

From the language of the act of 1879, and the amendatory act of 1885, and the nature and character of the power conferred, we are of opinion that the power was not exhausted or extinguished by its exercise in selecting and taking a part of West Washington street as a connection between that portion of Garfield Park lying north of Madison street with a part of the city of Chicago, and that appellant has power, under the statute, to select and take that part of West Jackson street lying between Halsted street and the park, and connecting the park lying south of Madison street with the city, if required for the public convenience or necessity.

The decree of the court below is reversed, and the cause remanded to that court, with directions to dismiss the bill.

Decree reversed.

Syllabus. Brief for the Appellant.

JACOB B. KING

v.

MARTHA A. COOPER.

Filed at Ottawa June 12, 1890.

1. *CHANCERY—cross-bill—whether necessary.* While no affirmative relief can be granted on answer, yet the court may require the complainant to do equity as a condition to relief, without a cross-bill.

2. *CONTRACTS—sale of land—rights and duties of parties are mutual and concurrent.* Where the notes given for the unpaid price of land sold are due, and no deed has been made, and both parties to the contract are in default, their rights and duties will be mutual and concurrent. The vendor will not be required to make a deed without payment of the notes, nor the purchaser to pay the notes without the execution or tender of a proper deed.

3. The vendor of land can not rescind the sale for the non-payment of an unpaid portion of the purchase money, and retain the money already paid and the improvements put upon the premises, without first tendering to the purchaser a deed properly executed, and making an offer to cancel and surrender his unpaid notes; but the court is not prepared to hold that the vendor shall also refund the money voluntarily paid on the purchase.

APPEAL from the Circuit Court of Henderson county; the Hon. JOHN J. GLENN, Judge, presiding.

Mr. A. M. ANTROBUS, and Mr. R. COOPER, for the appellant:

It is a well settled doctrine of the courts, that a parol partition of lands between tenants in common, carried into effect and consummated by possession taken by each of the shares so allotted, will be valid and binding. *Shepard v. Rinks*, 78 Ill. 188; *Grimes v. Butts*, 65 id. 347; *Gage v. Bissell*, 119 id. 305; *Bruce v. Osgood*, 113 Ind. 360.

In tenancy in common the titles are distinct, but there is a unity of possession, and the object of partition is to ascertain the separate possession of each. *Shepard v. Rinks*, 78 Ill. 188.

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A contract binding in equity for the sale of lands, though in fact unexecuted, is considered as performed, so that the land becomes the property of the vendee, and the purchase money that of the vendor. Adams' Eq. 305; Pomeroy's Eq. Jur. sec. 372; *Lanquel v. Benitz*, 23 Pa. St. 99.

The fact of a contract being made, and the intent of it at the time, are apparent. The appellee has a remedy at law on her notes, which she regarded as a part, and which was a part, of the original agreement. She sought her forum to enforce the payment of the contract on appellant's part, and went through the Supreme Court of Iowa (*Cooper v. King*, 72 Iowa, 136,) before she became convinced that she could not obtain a judgment upon these notes (the balance of the purchase money under this bargain) until she tendered a legal deed for her interest.

Messrs. KIRKPATRICK & ALEXANDER, for the appellee.

MR. JUSTICE BAKER delivered the opinion of the Court:

This is a bill in chancery, for partition, filed by Martha A. Cooper, against appellant and others. The bill alleges that Jacob B. King, Esther M. Hartzell, John F. King and the complainant were the owners of 240 acres of land, (describing it,) which they derived in equal portions under the will of their father, duly probated; that Jacob B. King had purchased the interests of said Esther and John F., and was the owner of the undivided three-fourths, and complainant the owner of the undivided one-fourth thereof, and the other defendants were mortgagees and judgment creditors of said Jacob B. The bill prays for partition, and for general and special relief.

The defendant, Jacob B. King, answered, admitting that the four persons named in the bill derived title as therein stated, that he purchased and owns the interests of said Esther and John F., but denying that complainant is the owner of or entitled to the one-fourth interest in said lands as tenant in

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common with him, and alleging that on the 5th day of October, 1881, he purchased her interest in all of said lands for the sum of \$2000, \$1000 of which was paid in cash, and the balance secured by his promissory notes payable to her; that in consideration thereof she agreed to convey her entire interest in the land to him, and did make and deliver to him her deed for a specifically described 60 acres thereof, for the purpose of conveying her one-fourth interest in the whole; that she surrendered possession of the whole of the land to him, and he has ever since been in possession, and has made lasting and permanent improvements thereon. He denies the right of complainant to equitable relief.

Replication was filed, and the cause heard on pleadings and proofs. No good purpose would be served by an extended discussion of the proofs. It is sufficient to say that the evidence sustains the allegations of the answer. Appellant testifies to the contract set up in the answer, and shows that the deed from Mrs. Cooper was taken for 60 acres of the land, by description, and a like deed from Mrs. Hartzell, for another 60 acres, and also a like deed from John King, for still another 60 acres; that said deeds were made with the understanding that they would convey the undivided interests of the grantors to appellant in all said lands. The testimony of appellant, coupled with the letters of Mrs. Cooper, put in evidence, clearly shows that the purchase was of her interest in the 240 acres of land. Mrs. Cooper does not testify or offer any testimony in contradiction. It seems that said Esther and John F. subsequently conveyed their interests in all the lands to appellant. The court decreed that Mrs. Cooper was seized, as tenant in common with appellant, of an undivided one-fourth interest in the 180 acres not included in her deed to appellant, and ordered partition accordingly.

It is said, in argument, that no effect can be given to the matters set up in the answer, for the reason that relief could be granted only upon cross-bill. This is a misapprehension.

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No affirmative relief could be granted upon the answer. But Mrs. Cooper, having come into equity demanding partition of these lands, would not, although possessed of the legal title, be permitted to reclaim the land and also retain the consideration paid for it. Seeking equity, she must do equity; and it would be manifestly unjust for her to recover her interest in these lands without at least a surrender and cancellation of appellant's notes given for the purchase of such interest.

It appears from the evidence that three notes were given for the unpaid purchase money of her interest in the land,—one for \$400, and two for \$300 each, payable in one, two and three years after date, with eight per cent interest. These notes remain unpaid, and while Mrs. Cooper is required to do equity, she is not required to submit to inequitable terms or conditions. It is very clear that both parties are in default. It appears that in December, 1884, Mrs. Cooper brought suit upon these notes in Iowa. The defendant there set up the purchase of her interest in said lands, and that the consideration of the notes had failed, and also, in the same proceeding, filed a cross-petition, setting up the agreement to convey all her interest, the conveyance of the 60 acres, and asking that she be required to convey her interest in the residue. Mrs. Cooper answered the cross-petition, denying that appellant had purchased any interest in her lands other than that described in her deed, and claiming that she had fully performed her contract, etc. Here was a clear attempt on her part to repudiate her agreement. The notes having become due, the rights and duties of the parties were mutual and concurrent. She could not be required to make a deed without payment of the notes, nor he to pay the notes without the execution of a proper deed. While we are not prepared to hold that she would be required to refund the money voluntarily paid by appellant on the delivery of the deed to 60 acres, equity would require, before she is permitted to rescind, and recover her interest in the lands not conveyed, upon which, in reliance upon

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his purchase thereof, appellant has made lasting and permanent improvements, that she should offer to carry the contract into effect, and upon the failure of the defendant to pay the purchase money, to surrender and cancel the notes given therefor.

At the hearing, the notes were produced, and identified by appellant as the notes given for the land, and payment demanded, and the notes were then offered to be filed, "and cancelled, if paid." It does not appear affirmatively that there was at any time a tender of a deed conveying Mrs. Cooper's interest in the 180 acres of land to appellant, and, as before seen, he was not bound to pay except upon a tender of such deed and surrender of the notes. On the other hand, the notes being past due, and it appearing that appellant was insolvent, she ought not to be required to deliver the deed without payment.

We are of opinion that the court erred in decreeing partition without requiring, as a condition, that she offer to perform by tendering a deed. At least, she should have been required, as a condition to any relief, to cancel and surrender the notes. There is no question of the Statute of Frauds raised in this case, and no discussion thereof will be necessary.

The decree of the circuit court will be reversed, and the cause remanded to that court, with directions that it enter a decree that upon the tender of a quitclaim deed, properly executed and acknowledged by complainant and her husband, if she have one, conveying all her and his right, title and interest in and to said lands not before conveyed by her to appellant, as the same was vested in her on the 5th day of October, 1881, appellant pay said notes, and the interest accrued thereon, within sixty days after such tender, and that in default of such payment, and upon the production and cancellation of said notes in open court, the complainant be decreed to be the owner in fee of the undivided one-fourth part of said 180 acres of land, as tenant in common with appellant, and that partition be made accordingly. If the complainant in the bill shall fail

Syllabus.

to make such tender of such deed, her bill shall be dismissed ; or if, after making the same, and the failure to perform by appellant, she shall fail to surrender and cancel such notes as hereinbefore directed, a decree shall be entered dismissing her bill.

Decree reversed.

JOEL J. BAILEY *et al.*

v.

C. W. PARDRIDGE *et al.*

Filed at Ottawa June 12, 1890.

1. AGENCY—*payment to agent—for goods sold by him—whether binding on the principal.* As a general rule, an agent who has the possession of goods belonging to his principal, with authority to sell, has an implied authority to receive payment for the goods when sold by him.

2. Where a traveling agent or salesman having authority to make sale of goods, but none to collect the price, takes orders from a purchaser for the shipment of goods to him by the principal, a payment to such agent for goods thus bought will not be binding on the principal. In such case, the agent, not having possession of the goods, will not be presumed to have authority to receive the price on a sale.

3. UNAUTHORIZED SALE OF GOODS — *ratification by the owner.* In case the owner whose goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale, although unauthorized, will be regarded as ratified.

4. If goods are sold without authority, and the owner receives the price, or pursues his remedy for it by action at law against the purchaser, or if any other act be done in behalf of another who afterwards claims the benefit of it, this is a ratification.

5. PAYMENT—*by check.* Where a check is given for goods purchased, in the absence of an agreement that it is accepted as payment it is but a conditional payment; but when a check is accepted as cash, and payment for the goods is receipted, that may be regarded as a payment.

6. EVIDENCE—*letters of opposite party—binding upon party offering them.* Where the plaintiff in an action introduces in evidence the letters of the defendant, he will make their contents evidence against as well as for himself.

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Statement of the case. Brief for the Plaintiffs in Error.

WRIT OF ERROR to the Appellate Court for the First District;—heard in that court on writ of error to the Superior Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

This was an action of assumpsit, brought by J. J. Bailey & Co., merchants doing business in Philadelphia, against the defendants, merchants doing business in Chicago, to recover payment for certain goods which had been sold by one Holmes, a traveling salesman of plaintiffs, to the defendants.

It appears from the evidence, that in the month of August, 1883, Holmes called at the store of the defendants, and offered to sell a lot of samples which he then had in his possession and claimed to own. The defendants bought the goods, and paid for them by giving Holmes a check, payable, at his own request, to Joel J. Bailey & Co. or bearer. Holmes did not deliver the check to plaintiffs, and they never received payment for the goods. By the terms of the contract under which Holmes was employed by plaintiffs, he had no authority to collect pay for goods sold; but defendants had no notice of that fact when they made the purchase. Upon making the sale of the samples to defendants, Holmes reported the sale to the plaintiffs, and they made out a bill of the goods, which was forwarded to the defendants. The defendants at once returned the bill, with notice that they had paid Holmes for the goods at the time of the purchase. Several letters passed between the parties, resulting in a refusal of defendants to pay for the goods, and plaintiffs brought this action to recover the price of the goods. On the trial, the court instructed the jury; that under the evidence the plaintiffs could not recover, and that the verdict must be for the defendants.

Mr. D. BLACKMAN, for the plaintiffs in error:

Everybody knows that a drummer does not carry with him the goods he sells, and that his samples are not for sale. He

Briefs for the Plaintiffs in Error.

simply takes orders, and makes no sales. *Finch v. Mansfield*, 97 Mass. 89.

The law of agency gave Holmes no right to sell samples and take pay. *Kindley v. Durham*, 55 Wis. 515; *Casson v. Noltner*, 43 id. 646; *Whiton v. Spring*, 74 N. Y. 169.

The fact that the goods were plaintiffs' samples was notice that Holmes was not authorized to make an absolute sale, and of a limitation on his authority from possession. *Hirshfield v. Waldron*, 54 Mich. 651; *Clark v. Smith*, 88 Ill. 298; *Abrahams v. Weiller*, 87 id. 179; *Dunn v. Wright*, 51 Barb. 244; *Saltus v. Everett*, 20 Wend. 281.

The only proof of the delivery of the check to Holmes consisted of statements in letters of defendants, which plaintiffs introduce in evidence as admissions of other facts. By the ruling of the court the letters were treated as conclusive evidence of the fact of the delivery of the check. The statements were not in themselves unreasonable or improbable, nor was there anything in the nature of the transaction or in the evidence tending to impeach them. The doctrine in such cases is, that the admission, with the accompanying declaration, which serves as an answer to the admission, is to be received in evidence, and the answer is conclusive. 1 Roscoe's Crim. Ev. (8th ed.) 54, 55; *Howell v. Moores*, 127 Ill. 70; *Arnold v. Johnson*, 1 Scam. 196; *Roberts v. Gee*, 15 Barb. 449; *Corbett v. State*, 31 Ala. 329.

The agency for receiving payment must be proved. *Dutcher v. Beckwith*, 45 Ill. 460; *People v. Deams*, 92 id. 192; *Law v. Stokes*, 32 N. J. L. 249; *Komeman v. Monaghan*, 24 Mich. 36; *Butler v. Dorman*, 68 Mo. 298; *Seiple v. Irwin*, 30 Pa. St. 513; *Clough v. Whitcomb*, 105 Mass. 482; 89 Ill. 522.

Messrs. FLOWER, SMITH & MUSGRAVE, also for the plaintiffs in error:

The giving of a check is not payment until the check is paid. 2 Morse on Banks and Banking, sec. 544; *Phillips v. Bullard*,

Brief for the Defendants in Error. Opinion of the Court.

58 Ga. 256; *Merrett v. Brackett*, 60 Me. 527; *Burkhalter v. Second Nat. Bank*, 42 N. Y. 538; *Taylor v. Wilson*, 11 Metc. 44; *Morris v. Kennedy*, 23 Kan. 408.

This is so even though the drawer had funds. *Everett v. Collins*, 2 Camp. 515; *Porter v. Talcott*, 1 Cow. 359.

In order to defend successfully, defendants in error should have proved a custom or usage in the trade as to the right of a commercial traveler to sell and receive pay for samples. *Kohn v. Washer*, 64 Texas, 131, is a case quite in point.

Messrs. BRANDT & HOFFMAN, for the defendants in error:

Where an agent is authorized to sell and is intrusted with the goods, he has an implied authority to receive payment. Story on Agency, sec. 102; *Capel v. Thornton*, 3 C. & P. 352; *Rice v. Graffman*, 56 Mo. 434; *Putnam v. French*, 53 Vt. 404; *Hoskins v. Johnson*, 5 Sneed, 470.

If a party whose goods have been sold without authority, sues the purchaser for the price, he thereby ratifies the sale. Story on Agency, sec. 259; *Cochran v. Chitwood*, 59 Ill. 53.

By bringing this suit plaintiffs not only ratify the sale, but also the act of their agent in accepting a check in payment. 2 Greenleaf on Evidence, sec. 519.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

The question presented by this record is one not entirely free from difficulty. As to the main features of the case there is no substantial controversy in regard to the facts. Holmes had possession of the samples, and claimed authority to sell and receive the pay therefor. The defendants purchased the samples, paid Holmes for them by check, payable to Joel J. Bailey & Co. or bearer, and he delivered the goods. So far as appears, defendants acted in perfect good faith, relying upon the representations of Holmes.

We think it may be stated as a general rule of law, that an agent who has the possession of goods belonging to his prin-

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cipal, with authority to sell, has an implied authority to receive payment for the goods sold. (Story on Agency, sec. 101; *Rice v. Groffman*, 56 Mo. 434; *Pulman v. French*, 53 Vt. 404; *Lumley v. Corbett*, 18 Cal. 495; *Capel v. Thornton*, 3 C. & P. 352.) In the case last cited, where goods had been sold and delivered by an agent, and he had received the pay, it is said: "There is no evidence that the defendant ever gave any order to the plaintiffs. Indeed, it is proved that the defendant only dealt with Ellsworth, who is admitted by the notice to be the agent of the plaintiffs, and if he, as their agent, had authority to sell goods, so he had, in the absence of advice to the contrary, an implied authority to receive the proceeds of such sale. The plaintiffs can not avow the acts of their agent as to one part of the transaction, and repudiate them as to another part." Had the agent, Holmes, sold defendants a bill of goods, and taken an order from them for a shipment of the goods from the house in Philadelphia, it is clear a payment to the agent for goods thus bought would not have been binding on the plaintiffs. (*Clark v. Smith*, 88 Ill. 298.) But this is a different case. Here, Holmes was not only clothed with the power of sale, but he had the possession of the goods, and was able to pass them over to the possession of the purchaser upon making sale, and receiving payment.

But it may be said that Holmes was not empowered by the plaintiffs to sell the goods,—that he merely held the samples as a means to solicit orders. A sufficient answer to this position is, that the acts of plaintiffs since the sale may be regarded as a ratification. Where the owner whose goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale, although unauthorized, will be regarded as ratified. (Story on Agency, sec. 259; 2 Greenleaf on Evidence, sec. 66.) The latter author says: "Thus, if goods are sold without authority, and the owner receives the price, or pursues his remedy for it by action at law against the purchaser, or if any

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other act be done on behalf of another, who afterwards claims the benefit of it, this is a ratification." See, also, *Peters v. Balleston*, 3 Pick. 495.

In the case under consideration, as soon as plaintiffs learned of the sale they made out a bill according to the contract price, presented it to the defendants, and demanded payment for the goods. This was followed by the present action in assumpsit to collect the amount for which the goods were sold. If, therefore, Holmes made the sale without direct authority, these acts of the plaintiffs, after full knowledge of the sale, may be treated as a ratification of the sale made by Holmes. The case then stands in this position: Holmes had possession of the goods, claiming the right to sell; he called on defendants, and they bought the goods; he delivered the goods, collected the pay, and gave defendants a receipt acknowledging full payment. Plaintiffs first deny authority to sell, but by their acts concede the power of sale, but deny authority to collect the pay for the goods. This they can not do. The power of sale, or the sale without authority, subsequently ratified, carried with it the implied power to receive payment. Had the sale been repudiated by the plaintiffs, and an action brought to recover the goods, a different question would arise. But that course was not pursued.

Kohn v. Mosher, 64 Tex. 131, has been cited as an authority to sustain plaintiffs' position. We do not regard the case as one in point. What was said by the court in the opinion seems to sustain the view of plaintiffs in error; but upon an examination of the case it will be found that the real point decided was, whether an instruction informing the jury that if a sale of the samples was embraced within the real or apparent scope of the agent's authority the principal would be bound by the sale, was authorized by the evidence, and the court held that it was not.

It is also insisted, that the evidence is not sufficient to establish payment of the goods. This is predicated on the position

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that the giving of a check for the goods was not a payment. Where a check is given for goods purchased, in the absence of an agreement that it is accepted as payment, it may be conceded, as held in *Heartt v. Rhodes*, 66 Ill. 356, and *Stevens v. Park*, 73 id. 388, that the check is but a conditional payment. But in this case we think it is clear, from the evidence introduced by the plaintiffs, that if a check was given for the goods it was accepted as absolute payment. In one of the defendants' letters read in evidence by the plaintiffs they say: "Your Mr. Holmes sold us the samples for cash. He delivered us the goods and got our check, payable to Joel J. Bailey & Co. or bearer. We had bought a sample line of lisle and ass't gloves two weeks previous to this lot, and paid him the cash for same, as he sold them to us for cash,—the both lots. He made out the bills, and we have receipts for same." If it be true that a check was given, as intimated in this letter, and it was accepted as payment, and a receipt given showing full payment, nothing more was required to establish *prima facie* payment. (2 Moore on Banks on Banking, sec. 546.) In another letter of later date, which plaintiffs read in evidence, will be found the following: "The goods referred to were bought * * * from your agent, Mr. Holmes, who had them in his possession, and were paid for in cash on delivery, as agreed on at the time of purchase; and all this was done in perfect good faith." This letter was sufficient to establish the fact that cash was paid for the goods on delivery. These letters were offered in evidence by the plaintiffs, and they were bound by the contents, and, under either, the fact of payment may be regarded as established.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

MR. JUSTICE BAILEY, dissenting.

Syllabus.

ANNA F. WARD

v.

ELIZABETH DURHAM et al.

Filed at Ottawa October 31, 1890.

1. ADMINISTRATION OF ESTATES—*jurisdiction—allowance of claims after the day appointed.* Where a claim is filed in the probate court against an estate after the publication of notice for the presentation of claims, but before the day set for that purpose, and long after the day so set for the adjustment of claims it is allowed, the record failing to show the presence of the administrator or objection on his part, it will, in the absence of allegation and proof to the contrary, be presumed that the cause was continued from term to term. In such case, the court will have jurisdiction both of the subject matter and of the persons, to render the judgment.

2. An administrator gives the court jurisdiction of his person by notice for the presentation of claims against the estate, and will be bound to take notice of the orders of the court continuing claims filed on or before the day named in his adjustment notice.

3. SAME—*allowance of claim binds personal property.* A judgment allowing a claim against an estate of a deceased person is not only conclusive on the administrator or executor, but also against the heir-at-law or devisee in respect to the personal estate, in the absence of fraud or collusion in its rendition; but it is not conclusive against the lands left by the decedent.

4. If the administrator is delinquent in his duty, and not defending against improper claims, the heirs will have a remedy on his bond.

5. SAME—*fraud—in presentation of claim.* There is no fraud in the presentation against an estate of a note of the decedent, without disclosing facts which would defeat the allowance of the same.

6. CHANCERY—*relief against judgment or decree.* To entitle a defendant to relief against a judgment or decree on the ground of fraud, accident or mistake, it must be made evident that he had a defense on the merits, and that such defense has been lost to him without his own omission, negligence or default. The loss of the defense must be caused by the fraud of the prevailing party, or by mistake on the part of the other party, unmixed with any fault of himself or agent.

7. Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, may be found to be overstated or over-estimated, is not the kind of fraud which will authorize a court of equity to set aside a judgment.

184	195
58a	58
134	195
163	444

134	195
80a	176
80a	278

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89a	*46

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187	*589

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98a	*574
98a	*578

184	195
190	*579
190	*583

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201	128
201	*129

184	195
202	*208

Statement of the case.

APPEAL from the Appellate Court for the First District ;— heard in that court on appeal from the Superior Court of Cook county ; the Hon. EGBERT JAMIESON, Judge, presiding.

Lucius G. Fisher died March 5, 1886. By his last will he made appellant (a daughter) his sole residuary legatee. Rachel C. Fisher, his widow, was nominated by the will, and qualified, as executrix. On the 10th day of January, 1887, the probate court of Cook county allowed a claim against his estate for \$1278.24, in favor of appellee Elizabeth Durham. On the 4th of May, 1888, appellant filed this bill in the Superior Court of Cook county. The bill sets out the will of Lucius G. Fisher, and the qualification of said executrix, and avers that she, on August 10, 1886, gave notice, fixing the following October term of the probate court of Cook county for the adjustment of claims against the estate of the testator ; that appellee Elizabeth Durham, on the 22d of September, 1886, filed a claim with the clerk of said court, sworn to by her, the claim being a promissory note, dated July 16, 1853, payable two years after date, to the order of B. Durham, for \$1800, with twelve per cent interest, signed by Jackson J. Bushnell and L. G. Fisher, and indorsed with numerous credits, the last of which was dated October 15, 1879. It further alleges, that neither said Elizabeth Durham, nor any one for her, appeared in said court at said October term and presented said claim to said court for allowance, but that on the 10th of January, 1887, it was allowed, without summons or other notice having been served on said executrix. It is also alleged in the bill, that the executrix had no personal knowledge of the filing or presenting of said claim for adjustment, or of the allowance thereof, until more than six months after it was allowed, and that her attorney did not have actual notice that it had been allowed until more than six months after such allowance ; “that through inadvertence, accident and mistake on the part of the attorneys of said executrix, no appearance

Statement of the case.

by said executrix or her attorneys was had, nor any objection, contest or defense made to the allowance of said claim; that although said attorneys knew that a claim had been filed by said Elizabeth Durham, yet they did not know the nature or character of it, and by some means or from some source unknown to your oratrix, they mistakenly understood and supposed that said claim was a proper one to be allowed against said estate, and did not know to the contrary until more than six months after the allowance of said claim, and for that reason they did not appear to said claim, were not present in court at any time when the matter of allowance thereof was before the court, did not know when it was allowed, or in fact that it was allowed, for more than six months after its allowance." The bill then proceeds to set out several defenses to said note, such as, that Fisher was but surety thereon, and that the time of payment had been extended to the principal by the payee; that the Statute of Limitations, both of Wisconsin (where the note was made) and of this State, had run against it long prior to the filing of said claim; that said Fisher had been discharged from all liability thereon by a prior proceeding in bankruptcy. It is also alleged, that certain of the payments indorsed on said note were never made, and were fictitious, "and that the claimant, when she made oath to said claim and procured its allowance, well knew, and had notice, that said payments had not been made, and that they were fictitious, and could not be used to prevent the running of the Statute of Limitations, and that both she and her attorney knew of the facts on which the said defenses were based, and knowingly suppressed the said facts, and so by fraud obtained the allowance of said claim, knowing that it was illegal, unjust and inequitable." Finally it is averred, that the complainant had, and still has, the fullest confidence in said executrix in all things relating to the administration of the estate of her father, and relied entirely on her to attend to all matters pertaining thereto. Appellees and said executrix are made de-

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fendants. The executrix, by answer, confesses the bill, and consents to a decree as prayed.

To the allegation charging that complainant knew that certain credits on said note were fictitious, and that she knew she had no valid claim against said estate, appellees filed a plea, averring that she had no notice that said credits were not for actual payments, and that she had no notice that her said claim was unjust or inequitable. Also, to the allegation that claimant did not appear at said October term and present her claim for allowance, they filed a plea, averring that she did appear at said term and did present her said claim for adjudication, setting up the records of said probate court in that behalf, showing her appearance at that time, and that after the presentation of her claim the claim was continued from term to term, until January 10, 1887, when it was allowed. To all other allegations of the bill they filed a general demurrer.

The hearing was had on the pleas and demurrer at the same time, and both were sustained. Appellant stood by her bill and made no reply to the pleas, and thereupon a decree was rendered dismissing the bill at complainant's costs. The Appellate Court having affirmed that decree, the complainant below now prosecutes this appeal.

Mr. JOSEPH A. SLEEPER, and Mr. FREDERIC ULLMANN, for the appellant.

Messrs. BLANKE & CHYTRAUS, for the appellees.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

The pleas filed by appellees were in fact but answers denying particular allegations of the bill, but appellant makes no objection to them on that ground, contending only that they are not broad enough to meet those allegations. In our view of the case these pleas are of no material importance in the

Opinion of the Court.

decision of the case. The substantial allegations of the bill are set forth in the foregoing statement, and if they are all admitted to be true, the decree of the circuit court dismissing it must be sustained.

The theory of the bill is: First, that the judgment of the probate court allowing said claim was rendered without jurisdiction; and second, that it was obtained through fraud, or by accident and mistake. It is also insisted, in the argument, that appellant is not concluded by said judgment. If this last position is tenable, the case may be readily disposed of. There can be no question but that the facts alleged, and which are admitted by the demurrer, would, on behalf of Fisher or his representatives, constitute a complete defense to the note on which the judgment was rendered, and therefore, if complainant is in no way bound by the allowance of said claim, she ought to have a decree restraining its collection.

It is contended, that inasmuch as an heir is not concluded by a judgment allowing a claim against the estate of his ancestor in a proceeding to sell lands to pay such judgment, neither should appellant be bound by this judgment, it appearing that her legacy will be taken, in whole or in part, for its payment. This argument ignores an important distinction in the relation which an administrator sustains toward the real estate of his intestate, and that which he or an executor bears to the personalty. In the one case, the real estate descends immediately to the heir, subject only to the payment of the just debts of the ancestor, and the administrator has no interest in or power over it, except in a proper case, and in the mode prescribed by statute, to sell it for the payment of debts. In the other, the administrator or executor is the sole representative of the personal estate,—hence, a claim regularly probated and allowed against an estate is conclusive against the personal estate, because the representative of that estate, viz., the administrator or executor, is before the court and a party to the judgment. It is not conclusive against the real estate, because

Opinion of the Court.

the owner of it (the heir) was not before the court—was not a party to the judgment. *Stone et al. v. Wood*, 16 Ill. 177.

In *Gold, Admr. v. Bailey*, 44 Ill. 491, it was held, that a bill by an heir to enjoin the collection of a judgment against the administrator, to be paid in due course of administration, on the allegation that the claim on which the judgment was based had been released, could not be maintained, and we there said: "This bill, it is true, is filed by one of the heirs of Bailey, and not by the administrator. But the judgment was duly obtained against the administrator, who was the legal representative of the deceased, and it is not alleged that he acted fraudulently or collusively. That judgment binds the personal estate, in the absence of fraud. If the administrator has been delinquent in his duties, the heirs have their remedy on his bond; but the practice can not be tolerated, of compelling persons holding claims against estates to litigate them first with the administrator and then with the heirs, upon the same point or points which might have been investigated in the first case. This would lead to endless confusion. The administrator is the sole representative of the personal estate, and relief is not sought here on the ground that he is seeking to subject the real estate to the payment of debts, or that it will be necessary to do so."

In *Draindege v. Washington's Exrs.* 2 Pet. 377, it was held, that in a suit for the distribution of a fund under a will, the residuary legatees were not necessary parties. MARSHALL, C. J., delivering the opinion of the court, said: "They have, undoubtedly, an interest in reducing the sum to be allowed out of it to the complainant, but they have the same interest in reducing every demand on the estate. Whatever remains sinks into the residuum, and that residuum is diminished as well by the claims of creditors and specific legatees, as by this. In all such cases the executors represent the residuary legatees, and guard their interests. It is a part of that duty which requires them to protect the interests of the estate. In such

Opinion of the Court.

suits the residuary legatees are never made parties. To require it would be an intolerable burden on those who have claims on an estate in the hands of executors." See, also, Story's Eq. Pl. secs. 144, 148, 150.

If the judgment here questioned is binding upon the executrix, it must be held conclusive as against complainant. The only defect in the jurisdiction of the probate court, according to the bill, arose from a failure of the claimant to formally present her claim for adjustment at the October term, 1886. There is no allegation that the claim was not regularly continued, from term to term, after it was filed, and it must therefore be presumed that it was so continued. Having given notice to all creditors to present their claims at said October term, and this claim having been filed after such notice was given, and prior to said adjustment term, and regularly continued thereafter until allowed, the court had full jurisdiction both of the subject matter and person to render the judgment on the 10th of January, 1887. The filing of the claim was a presentation of it to the court. There is not even an allegation that the executrix or her attorneys were present at the October term, so that the claim could have been formally presented to her. She gave the court jurisdiction of her person at the October term, by the adjustment notice, and she was bound to take notice of the order of continuance at that or any subsequent term.

The bill not only fails to show legal fraud, accident or mistake, but it convicts the executrix and her attorneys of gross negligence. The claimant did nothing to mislead the executrix or her attorneys. The complaint is, that she did not inform the court of facts which would, it is said, have defeated her claim,—in other words, did not herself interpose the defenses which the executrix and her attorneys, through negligence, had seen fit to waive. It is not pretended that the note had in any way been paid or satisfied. There was nothing im-

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moral, unjust or inequitable in her collecting it, if the makers or their representatives chose to pay it or waive defenses to it.

To entitle a defendant to relief against a judgment or decree on the ground of fraud, accident or mistake, it must be made evident that he had a defense upon the merits, and that such defense has been lost to him, without such loss being attributable to his own omission, negligence or default. The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake on the part of the losing party, unmixed with any fault of himself or agent. (Freeman on Judgments, sec. 486; *Tallman v. Becker*, 85 Ill. 183; *Allen v. Smith et al.* 72 id. 331.) Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, might be found to be overstated or overestimated, is not the kind of fraud which will authorize a court of equity to set aside a judgment. (Kerr on Fraud and Mistake, 353.) We said in *Galena and Southern Wisconsin Railroad Co. v. Ennor*, 116 Ill. 55: "It can not be allowed as a ground for setting aside a judgment, that there was false testimony given on the trial, or false assertions as to liability previously made. If this were admitted, there would be little stability in judgments. * * * The proof fails to show that the complainant was prevented from availing himself of his defense by the fraud or act of the opposite party, unmixed with negligence or fault on his part." See, also, *United States v. Throckmorton*, 98 U. S. 68; Story's Eq. Jur. sec. 1575.

We are unable to find any sufficient allegation of fraud, accident or mistake in this bill, within the meaning of the law, upon which to base a decree setting aside the judgment complained of. On the contrary, it shows gross negligence on the part of the executrix and her attorneys, for which no legal excuse appears.

The judgment of the Appellate Court must be affirmed.

Judgment affirmed.

THE CITY OF LAKE VIEW

v.

CHARLES MACRITCHIE *et al.**Filed at Ottawa October 31, 1890.*

1. CONTRACT—for work to be done—specifications, including a guaranty—as a part of the contract—extent of the guaranty. A contract between contractors and a town, for laying a water pipe in a lake connecting with water-works, referred to the specifications, and plan thereto attached, as more fully describing what was to be done by the contractors, and expressly made the same a part of the contract. The specifications contained a provision that “all of the work to be guaranteed to remain in good condition for one year from date of acceptance:” *Held*, that such guaranty was as effectually made a part of the contract as if its very words had been incorporated in it.

2. Contractors for making an improvement according to the plans and specifications, may guaranty against all defects, whether they arise from insufficiency of the materials, unskillfulness of workmen, or from unfitness of the plans or designs, whether devised by the one or the other of the parties to the contract, or by some other person.

3. A party contracted with a village for the laying of pipes to supply water, which was to be done according to plans and specifications furnished by the village engineer, and all work and materials were to be to his satisfaction and subject to his approval. The specifications contained this clause: “All of the work to be guaranteed to remain in good condition for one year from date of acceptance:” *Held*, that the guaranty was not to be limited to work and materials furnished by the contractor, but embraced the plans and specifications, and covered the structure or work as an entirety, which was the joint product of the plan or design, the labor bestowed and the material furnished. It will be presumed that the consideration for such guaranty was included in the contract price.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. ELLIOTT ANTHONY, Judge, presiding.

This was an action of debt, on a bond given to secure the performance of a certain contract entered into by MacRitchie & Nicol, two of the appellees herein, to furnish and lay on

134	208
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134	203
181	599

Statement of the case.

the bottom of Lake Michigan an inlet-pipe, to be connected with the Lake View water-works. The condition of the bond, so far as material to the questions in this case, is, that the contractors "shall in all respects well and truly keep and perform the said contract, in accordance with the terms thereof, and the plans and specifications therein referred to, in the times and manner described; and further, shall indemnify, keep and save harmless the town of Lake View from all liabilities, * * * damages and expenses in consequence of granting said contract, or which may in anywise result from the carelessness or neglect of said MacRitchie & Nicol, their agents, employes or workmen, in any respect whatever."

By the terms of the contract the contractors were to furnish all the material and do all the work required for the complete construction of an inlet-pipe and crib, together with a complete branch inlet-pipe and intake, to be connected with the well of the water-works, in accordance with the plans and specifications attached to said contract, and made a part thereof. One of the provisions of the contract was, that "all the work shall be executed in the best and most workmanlike manner, and no improper material shall be used, but all materials of every kind shall fully answer the specifications, or, if not particularly specified, shall be suitable for the place where used." All material used and all labor performed was subject to the inspection, and the approval or rejection, of the town engineer, and he had the right finally to decide all questions arising as to the proper performance of said work, and the work was to be done under his immediate direction and superintendence. The specifications describe the work, the size and material of the pipe, the flexible joints to be placed therein, and specify the number of piles to be driven along the line of the pipe, at such points as might be directed by the engineer, and the number of ball and socket joints to be used on the line of pipe, which was to extend from the shore end two thousand feet into the lake. The specifications also contained this clause:

Statement of the case.

"All of the work to be guaranteed to remain in good condition for one year from date of acceptance." The engineer of the town drew the plans and specifications, and the work under the contract was entered upon and carried to completion under his actual direction. Twenty flexible ball and socket joints were required by the specifications to be placed on the line of said pipe, but the distance apart or location of said joints was not detailed in any manner, but as the pipe was laid they were placed as the engineer directed, though the location of them was contrary to the judgment of the contractors. Some months after the work was completed and accepted by the town, a break was found in the pipe, and the same was taken up by the town at considerable expense, and to recover the expense so incurred the action was prosecuted on the bond.

On the trial it was one of the contentions of appellees that the break did not occur by reason of any defect in material or workmanship, but was due to defects in the plan and specifications adopted by the town and its engineer, in the lack of a sufficient number of flexible ball and socket joints to enable the pipe to conform itself to the undulations on the bottom of the lake, which were changed by every severe storm, and that the ball and socket joints that were in the pipe were improperly distributed along it, so that at points where, owing to the distance from the shore and the effect of the waves in moving the sand upon the bottom, they should have been placed at short intervals in the pipe, they were, by direction of the engineer, placed one hundred and fifty feet apart, and at other points where not needed they were placed close together. It was the theory of the trial court, however, that the guaranty clause contained in the specifications bound the contractors for any breaks that might occur in the work within one year from its acceptance, even though such break could not be ascribed to bad workmanship, or the use of defective or improper materials.

Briefs of Counsel.

The court, at the request of appellant, instructed the jury that the provision in the specifications whereby the contractors guaranteed that the work should remain in good condition for one year, was in fact a guaranty, not only that the work should be done in the most workmanlike manner and with proper materials, but that the contractors would further see that it would remain in good condition for one year from the date of acceptance; and refused to instruct, as requested by appellees, that if the evidence showed that the break in the pipe was not owing to any defective workmanship or material in the execution of the contract by appellees, but was owing to defects in the plans devised by the town's engineer, and adopted by the authorities of the town, for the construction and laying of said pipe, the plaintiff could not recover.

The verdict and judgment in the Superior Court of Cook county were in favor of appellant, and for \$3000 damages. On appeal to the Appellate Court that judgment was reversed, and the record was subsequently brought here by this further appeal.

Mr. JONAS HUTCHINSON, for the appellant:

A man may agree that his work in building a carriage, a threshing machine or a steam engine shall remain in good condition for a given time, although he did not design it, and the design was wholly of the person for whom the article was made.

Messrs. FREEMAN & WALKER, for the appellees:

The warranty, "all of the work to be guaranteed to remain in good condition for one year," etc., applies only to the material and workmanship furnished by the contractors. It did not bind them to anything more.

The contractors are not responsible for defects in the plan or design of the work.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court :

The instrument which was executed by MacRitchie & Nicol and the town of Lake View specifically referred to the specifications, and plan thereto attached, as more fully describing that which was to be done by the contractors, and expressly made the same part of the contract, and so the provision in the specifications, "all of the work to be guaranteed to remain in good condition for one year from date of acceptance," was as effectually made a part of the contract as it would have been had the very words of such provision been incorporated in the writing which was signed. The guaranty that the work should remain in good condition for the designated period of time was not, by the terms of the contract, limited to the work to be done and the materials to be furnished by the contractors. It was elsewhere in the agreement expressly stipulated that their work should be executed in the best and most workmanlike manner, and not only that no improper materials should be used, but that all materials furnished, of every kind, should fully respond to the requirements of the specifications, and that wherein the particulars of the materials supplied were not specified, such materials should be suitable for the place where used ; and moreover, all such materials and all labor performed were subject to the inspection of the town engineer, and to his approval or rejection.

MacRitchie & Nicol were contractors of many years' experience in the character of work involved in the contract, and a few years before had laid a similar pipe for the same municipality, within a few feet of the proposed line of pipe. They had full notice and knowledge what the plan or design of the contemplated structure was, and in the contract which they signed, special reference was made to the specifications and plans appended to such contract. They also knew the work was to be done in accordance with the direction of the town engineer, and expressly agreed to do the work under his imme-

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diate direction and superintendence, and to his entire satisfaction, approval and acceptance. By their contract, voluntarily entered into, they agreed to be governed by the directions of the engineer, and his judgment and opinion, in the absence of fraud, bound them as conclusively as it did the town. In other words, both parties, the contractors as well as the town, assumed the risk, except as otherwise specially provided for in the contract, of an error of judgment, under circumstances of good faith, of the engineer, in giving his directions in respect to the contemplated work. (*Canal Trustees v. Lynch*, 5 Gilm. 521; *Wallace v. Curtiss*, 36 Ill. 156; *Fowler v. Deakman*, 84 id. 130; *Snell v. Brown*, 71 id. 133; *Finney v. Condon*, 86 id. 78; *Stose v. Heissler*, 120 id. 433.) Thus, knowing the whole plan and design of the work, and being fully advised that they would be compelled to follow the directions given by the engineer, and conform to his judgment in respect to all matters of detail not particularly determined by the contract and specifications, they warranted that the work would remain in good condition for one year from the time of its acceptance by the town. The clear and natural import of the language used, when applied to the subject matter of the contract,—i. e., the inlet-pipe and crib and branch inlet-pipe and intake, including the ball and socket joints, and every other part of the work described in the plans and specifications,—was, that the structure or work, as an entirety, which was the joint product of the plan or design, the labor bestowed and the materials furnished,—all three combined,—would remain in good condition.

No reason is perceived why contractors may not guarantee against all defects, whatever their origin,—whether they arise from insufficiency of the materials supplied, from unskillfulness of workmen, or from unfitness of the plan or design,—whether devised by the one or the other of the parties to the contract, or by some other person. In case of a contract with such warranty, it will be presumed that the consideration for the guaranty was included in the price agreed to be paid for

Syllabus.

the work to be done. It is not unreasonable to suppose that one desiring a fabric or structure, or an apparatus, or a piece of mechanism to be made, the idea of which is his own or that of his servant or agent, may wish to take the judgment as to its practicability, usefulness and durability, of some person or persons who have a practical knowledge and experience in the construction of things of that sort, and in such case the requirement of a guaranty would be an effectual way of getting the benefit of such judgment. It is the province of the courts to enforce the contract which the town and these contractors have made,—not to make a contract for them. It must be presumed, that had it been their intention to limit the guaranty to the workmanship of the contractors and their servants, and to the materials furnished, such intention would have been expressed in the contract.

The rulings of the trial court were in substantial conformity with the views herein expressed, and we find no error in the record made in that court. In our opinion it was error in the Appellate Court to reverse the judgment of the trial court.

The judgment of the Appellate Court is reversed, and the judgment of the Superior Court affirmed.

Judgment reversed.

THE JOLIET STEEL COMPANY

v.

BENJAMIN SHIELDS.

Filed at Ottawa October 31, 1890.

1. NEGLIGENCE—master and servant—fellow-servants. Where one servant is injured by the negligence of his fellow-servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master will not be liable for the injury. Where,

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134	209
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145	642
41a	594
134	209
147	233
42a	642
134	209
152	487
45a	211
45a	454
134	209
50a	644
52a	424
52a	659
134	209
156	558
134	209
55a	329
134	209
68a	528
134	209
69a	612
70a	343
134	209
172	318
173	104
134	209
80a	909

Statement of the case.

however, one servant is injured by the negligence of another servant of the common master, but not within this description of fellow-servant, the master will be liable.

2. *SAME—of the pleadings—in order to charge the common master—for injury to one servant resulting from the negligence of another.* In an action by a servant against his master, it is not sufficient for the plaintiff merely to allege and prove an injury to himself from the negligence of the defendant's servants, generally. It should be averred and proved that the servants whose negligent acts are complained of, were not the fellow-servants of the plaintiff; and the omission of such allegation is not cured by the verdict, but is ground in arrest of judgment.

3. Nothing will be presumed after verdict but what must have been necessarily proved under the averments of the declaration. Any presumption of proof of facts not alleged in a declaration will be rebutted by an instruction to find for the plaintiff, if the jury believe, from the evidence, that the plaintiff was injured in manner and form as charged in the declaration.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. CHARLES BLANCHARD, Judge, presiding.

This was an action on the case, by appellee, against appellant. The declaration contains two counts. The first alleges possession by appellant, on August 1, 1887, of a steel mill, and that on that date the plaintiff was in the employ of the defendant as a track repairer, and that it was the plaintiff's duty to repair a certain railroad track within the converting mill; that on that day the appellant, by its servants, was piling certain iron molds in the converter, near the railroad track; that it was the duty of the defendant to use due care in placing said molds, so that it should not be dangerous to the safety of other servants who were then engaged in repairing the railroad track; that the defendant, by its servants, carelessly placed one of said iron molds in an insecure and dangerous position near the track, and allowed it to remain so for a long space of time, to-wit, two hours, and while the plaintiff was engaged in repairing the track within the con-

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102a 428
102a 424
102a 424

184 209
205 212
107a 584
107a 585
107a 586

184 209
e208 200

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184 209
e215 589
115a 581

Brief for the Appellant.

verter, and exercising due care, said mold slipped and fell on the track, and on the foot of the plaintiff, causing such injuries as to require amputation.

In the second count is alleged the possession of the mill known as a converter, in which converter steel was poured from ladles into large molds, and the molds were placed by the servants of the defendant in various positions on the floor of the converter; that plaintiff was in defendant's employ, and it was his duty to repair the railroad track within the converter; that it was the duty of the defendant to keep all appliances and material near the railroad track in a secure and safe condition; that on the date aforesaid, the plaintiff was in the discharge of his duties, and exercising ordinary care, in repairing the railroad track within said converting mill; that the defendant, by its servants, negligently placed a certain mold filled with steel near to said railroad track, in an insecure and unsafe condition, and allowed the same to remain there for three hours, and while the plaintiff was repairing the track, the iron mold, by reason of its insecure position, slipped and fell on said railroad track, and on the leg and foot of the plaintiff, whereby the same had to be amputated.

Appellant pleaded not guilty. Verdict was rendered for appellee, assessing his damages at \$3000. Appellant moved for a new trial, and upon that motion being overruled, it moved in arrest of judgment, which motion was also overruled, and the court then entered judgment upon the verdict of the jury. The case was then taken, by the appeal of the present appellant, to the Appellate Court for the Second District, and the judgment of the circuit court was there affirmed. This appeal is from that judgment.

Messrs. GARNSEY & KNOX, for the appellant:

The declaration discloses no cause of action. It avers that appellee was a fellow-servant, with others, in appellant's employ, and that he was injured by negligence of co-employees.

Brief for the Appellant.

Cooley on Torts, (2d ed.) p. 637, sec. 541; *Railway Co. v. Moranda*, 93 Ill. 302; *Stafford v. Railroad Co.* 114 id. 247.

The appellee's evidence should have been excluded, for the reason that under the declaration he could not make out a case, and if the evidence did, it was not admissible. The *allegata* and *probata* must agree. *Railroad Co. v. Bell*, 112 Ill. 365.

For a clear discussion of necessary averments in a *narr.*, and the effect of a failure to insert them at any time, see *Powder Co. v. Tearney*, 131 Ill. 322, and *Bartlett v. Crozier*, 17 Johns. 456.

The first instruction was erroneous. It told the jury to find for the plaintiff if the allegations of his *narr.* were proven. The *narr.* being defective, the instruction is erroneous.

The appellee's second, fourth and sixth instructions are erroneous. The fact that there are different departments of labor in an establishment, with separate superintendents, will not relieve those employed in one department from the rule regarding fellow-servants, as to servants employed in another department, when the duties of each, in their common employment, bring them, from time to time, together; nor the fact that in their several departments the employment of each is distinct and different in kind. *Railroad Co. v. Moranda*, 93 Ill. 302; 108 id. 580; *Abend v. Railroad Co.* 111 id. 202; *Rolling Mill Co. v. Johnson*, 114 id. 58; *Railroad Co. v. Hoyt*, 122 id. 375; *Railroad Co. v. Avery*, 109 id. 314; *Railroad Co. v. Geary*, 110 id. 383; *Railway Co. v. Morgenstern*, 106 id. 216; 15 Bradw. 138; *Shedd v. Moran*, 10 id. 626; *Railroad Co. v. O'Bryan*, 15 id. 140; *Railway Co. v. Simmons*, 11 id. 153; *Railway Co. v. Conkling*, 15 id. 159; *Railroad Co. v. Hoyt*, 16 id. 243.

The appellee showed no right of recovery. The court should therefore have taken his case from the jury. If the evidence is such, that in case of a verdict for one party the court must grant a new trial, the court should either exclude the evidence

Brief for the Appellee. Opinion of the Court.

or direct the jury to find in favor of the other. *Simmons v. Railroad Co.* 110 Ill. 346; *Bartelott v. International Bank*, 119 id. 259.

Mr. J. W. DOWNEY, and Messrs. HALEY & O'DONNELL, for the appellee:

Section 6, of chapter 7, of the Revised Statutes, provides: "Judgment shall not be arrested or stayed after verdict, * * * or in any way affected, by reason of any of the following imperfections: * * * Fifth, for any mispleading," etc. See *Mechanicsburg v. Meredith*, 54 Ill. 84; *Keegan v. Kinnare*, 123 id. 280; *Railway Co. v. O'Conner*, 115 id. 254.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

The rule in this State is, where one servant is injured by the negligence of his fellow-servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable. *Stafford v. Chicago, Burlington and Quincy Railroad Co.* 114 Ill. 244; *Chicago and Northwestern Ry. Co. v. Moranda*, 93 id. 302; *Chicago and Eastern Illinois Railroad Co. v. Geary*, 110 id. 383; *Chicago and Northwestern Ry. Co. v. Snyder*, 128 id. 655; *Rolling Mill Co. v. Johnson*, 114 id. 57; *Chicago and Alton Railroad Co. v. Hoyt*, 122 id. 369. It follows, and is recognized by these cases, that where one servant is injured by the negligence of another servant of the common master, but not within this description of fellow-servant, the master is liable. See, also, *Chicago and Alton Railroad Co. v. May*, *Adm.* 108 Ill. 288; *Chicago and Northwestern Ry. Co. v. Snyder*, 117 id. 376; *Chicago and Alton Railroad Co. v. Kelly*, 127 id. 637.

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In all actions for negligence the burden is upon the plaintiff to allege and prove such negligent acts of the defendant as will entitle the plaintiff to recover. *Chicago, Burlington and Quincy Railroad Co. v. Harwood*, 90 Ill. 425; *Chicago, Burlington and Quincy Railroad Co. v. Gregory*, 58 id. 272; *Blanchard v. Lake Shore and Michigan Southern Ry. Co.* 126 id. 416; *Patterson's Ry. Accident Law*, sec. 373, and cases cited in note. The words "defendant's servants," clearly include any and all of defendant's servants, and so, necessarily, it is not sufficient, here, merely to allege and prove an injury to the plaintiff from the negligence of the defendant's servants generally, for it is just as consistent with that allegation and proof that the defendant is free of liability as that it is liable. The omission to allege that the defendant's servants causing the plaintiff's injury were not the fellow-servants of the plaintiff, within the description of such servants, *supra*, was not cured by verdict, because the denial of the allegations of the declaration imposed no duty upon the plaintiff in that respect. When he had proved that he was injured by the negligence of the defendant's servants, he had proved all that he had alleged. But, since the defendant was not liable merely because the plaintiff was injured by the negligence of the defendant's servants, he was entitled to contest and disprove that its servants by whose negligence the plaintiff was injured, were such servants as rendered it liable to the plaintiff for their negligence.

The rule being, that nothing will be presumed after verdict but what must have been necessarily proved under the averments of the declaration, the court erred in overruling the motion in arrest. (*Chichester v. Vass*, 1 Call, 83; *Bartlett v. Crozier*, 17 Johns. 457.) Moreover, any presumption that might, by any possibility, have otherwise been indulged to the effect that the plaintiff was required to make proof that the servants causing the injury were not the fellow-servants of the plaintiff, is precluded by the first instruction given at the instance of the plaintiff, which reads as follows :

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"On the part of the plaintiff you are instructed, that if you believe, from the evidence, that the plaintiff was in the employ of the defendant, and that while in such employ, and in the use of due and ordinary care and caution for his personal safety, the plaintiff was injured in manner and form as charged in the declaration, by reason of the negligence of the defendant, then you will find the defendant guilty."

The jury, obeying this instruction, were bound to find for the plaintiff if the plaintiff was injured "in manner and form as charged in the declaration."

For the error indicated, the judgments below are reversed, and the cause is remanded to the circuit court, with leave to the plaintiff, if he shall be so advised, to amend his declaration, and for a trial thereafter *de novo*.

Judgment reversed.

JOHN P. HIER *et al.*

v.

ABRAHAM KAUFMAN *et al.*

Filed at Ottawa October 31, 1890.

1. PARTNERSHIP—powers of individual partners—to act in the name of the firm—giving notes—warrant of attorney to confess judgment, etc.—ratification—presumption. One partner may sign the firm name to a note given in the ordinary course of business for a firm debt.

2. But one partner can not execute a warrant of attorney to confess a judgment in the firm name, without express authority from the other partner, or the ratification of the act by the latter.

3. Where judgment notes, however, are signed in the firm name by one partner, alone, but with the assent of the other partner, he making no objection thereto, the authority to sign the firm name, or the ratification of the act, must be presumed.

4. INSOLVENT DEBTORS—giving judgment notes or other security to creditor—whether within the act. The statute relating to voluntary assignments by insolvent debtors does not prohibit such a debtor from giving his creditor a judgment note or other security, unless it is made

134	215
140	17
41a	215
41a	375
134	215
42a	259
134	215
150	59
151	245
134	215
52a	144
134	215
162	42
58a	191
134	215
59a	405
134	215
69a	539
134	215
74a	349
75a	97
134	215
78a	173
134	215
84a	618
134	215
185	437
87a	473
134	215
99a	5427
134	215
e101a	5627
e101a	5627
134	215
200	074

Brief for the Appellants.

184 215
104a *287

184 215
f218 *402

after he has made up his mind to assign, and with a view thereby to give a preference, in fraud of the act. If the debtor has no intention of ceasing business when he gives a judgment note or other security, and expects to continue his business, such security will be valid and binding.

5. JUDGMENT BY CONFESSION—*equitable jurisdiction in courts of law—opening judgment and letting in defense.* Courts of law exercise an equitable jurisdiction over judgments by confession, so that where there is a want of service, or an absence of authority to confess, the debtor will not be driven into a court of chancery, but may move to set aside the judgment in the court of law. A court of law may open the judgment and allow the debtor to make his defense, leaving the judgment to stand as security.

6. The assignee of an insolvent debtor takes the property assigned subject to all valid pre-existing liens; and where such property is subject to the lien of an execution issued upon a judgment entered by confession under a warrant of attorney, and such judgment is opened to let the defendant interpose a defense, the county court should wait until the defense is heard and decided, before determining upon the lien of such an execution. If the defense is successful, the lien falls; otherwise it must be enforced.

7. CHANCERY—*relief against judgment—not for defect or want of service.* A court of equity will not set aside a judgment of a court of law for an alleged want of service of process, unless the judgment is shown to be unjust and inequitable. This rule applies also to judgments by confession under warrants of attorney.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the County Court of Cook county; the Hon. RICHARD PRENDERGAST, Judge, presiding.

MESSRS. PAGE, ELIEL & ROSENTHAL, for the appellants.

MESSRS. KRAUS, MAYER & STEIN, also for the appellants:

A partner has not the power to bind his firm by a confession of judgment. *Girard v. Basse*, 1 Doll. 119; *Sloo v. Bank*, 1 Scam. 428; *Barlow v. Reno*, 1 Blackf. 252; *Grafebrooke v. McCreddie*, 9 Wend. 437; *Crane v. French*, 1 id. 311; *York's Appeal*, 36 Pa. St. 458; *Bitzer v. Shunk*, 1 W. & S. 340; *Shed v. Bank*, 32 Vt. 709; *Christie v. Shennan*, 10 Iowa, 535; *Edwards v. Pitzer*, 12 id. 607; *North v. Mudge*, 13 id. 496.

Brief for the Appellees.

Whether the signing partner disappears or not, his co-partners may sell the entire stock of the firm to pay its debts in good faith, and they may either divide the proceeds of the same *pro rata* among all their creditors, or they may exclude the payee in the note from any share in the distribution of them. *Schneider v. Sanson*, 62 Texas, 201; *Graser v. Shellwagen*, 25 N. Y. 315; *Lamb v. Durant*, 12 Mass. 54; *Arnold v. Brown*, 24 Pick. 89; *Cayton v. Hardy*, 27 Mo. 536; *Halstead v. Shepard*, 23 Ala. 558; *Williams v. Barnett*, 10 Kan. 455.

Appellees received an unlawful preference. *Bank v. Rehm*, 126 Ill. 461; *Hanford Oil Co. v. Bank*, id. 584; *Field v. Geoghegan*, 125 id. 68.

Messrs. QUIGG & BENTLEY, for the appellees:

The validity of the judgment of November 27, 1888, in favor of the appellants and against the insolvents can not be questioned in this proceeding. This proposition holds good even if the validity of said judgment is to be determined upon the facts appearing in this record.

The ancient rule, that one partner can not bind another by confessing judgment in the firm name, is not supported by reason, and should not be recognized. *Truett v. Wainwright*, 4 Gilm. 411.

A judgment confessed by one partner in the name of the firm should be upheld as a lien on the partnership assets, at least. *Grier v. Hood*, 25 Pa. St. 430.

The evidence preserved in this record shows that Sues had authority from his partner to confess judgment in the firm name. *Brutton v. Burton*, 1 Chitty, 707.

But the validity of the judgment of November 27, 1888, can be determined only by the record of that judgment,—not by the record of this appeal; and by the former record its validity is unquestionable. *Searle v. Galbraith*, 73 Ill. 269; *Bush v. Hanson*, 70 id. 480; *Iglehart v. Chicago, etc. Co.* 35

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id. 514; *Swearengen v. Gulick*, 67 id. 208; *Anderson v. Field*, 6 Bradw. 307; *Jackson v. Tift*, 15 Ga. 557.

The proceedings taken by Uhlendorf since the judgment of November 27, 1888, was entered, have given it validity if it was not valid originally. *Lyon v. Boilvin*, 2 Gilm. 629; *Pier-son v. Holman*, 5 Blackf. 482.

The validity of the judgment of November 27, 1888, being unimpeachable in this proceeding, the order of the county court here appealed from is erroneous.

The claim that said judgment was entered on notes which had been delivered *in escrow*, only, and the further claim that said judgment, and the execution issued thereon, were preferential, and void under the Voluntary Assignment act of Illinois, are shown to be false.

The preferential act was the giving of the notes. *Field v. Geohegan*, 125 Ill. 68; *Hanford Oil Co. v. Bank*, 126 id. 584.

An assignment was not contemplated by the insolvents until after the notes were given, nor until after the judgment of November 27 had been entered on said notes.

Mr. JUSTICE MACRUDER delivered the opinion of the Court :

On November 27, 1888, Sues & Uhlendorf, a firm, composed of Henry Sues and Lebrecht Uhlendorf, and engaged in the wholesale and retail tobacco and cigar business in the city of Chicago, confessed judgment for \$16,217.70 in the Superior Court of Cook County, in favor of Kaufman Bros. & Co., a firm composed of Abraham Kaufman, Herman Kaufman and David Lachenbruch, and engaged in business in New York City as manufacturers of and wholesale dealers in cigars. Execution was at once issued upon the judgment and levied upon all the tangible personal property of the debtors. On the same day, but later in the day, Sues & Uhlendorf executed and filed in the County Court of Cook County an assignment for the benefit of creditors to one Otto C. Schneider. The

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assignee found the Sheriff in the possession of the property. On November 28, 1888, the County Court entered an order, decreeing that the assignee take possession "subject in all respects to the lien of the said execution," and directing that the Sheriff turn over to the assignee all the property so levied upon "subject to the lien of such execution and the right of said judgment creditors, * * * leaving to be determined in this (County) court the question of the validity of such lien upon and to the said property * * * and the proceeds thereof." In pursuance of such order the property was accordingly turned over by the Sheriff to the assignee.

On January 30, 1889, the appellant, Hier, filed a petition in said county court, setting up, among other things, that Sues & Uhlendorf had become indebted to him for the purchase of goods, that he had brought suit in said Superior Court and obtained judgment on January 9, 1889, for \$1279.50, and issued an execution thereon, and delivered the same to the Sheriff, and that such execution was a lien upon the personal property of Sues & Uhlendorf. The petition prayed, among other things, that the judgment of the appellees, Kaufman Bros. & Co., be set aside as fraudulent, preferential and void. Answers were filed by Kaufman Bros. & Co. and by Schneider, the assignee. Replications were filed to the answers. The petition was thus treated as a bill in chancery, and the issues formed upon it were disposed of by the county court, as though the proceeding was a regular chancery cause. Evidence was heard in open court, and on March 11, 1889, the County court entered an order, finding that the judgment of the appellees and the execution issued thereon were void as preferences under the Assignment Act of this State, and decreeing said execution to be void as a lien on said property and as a preference in the distribution of the assets of the assignors, and denying to the same any right of priority in such distribution.

The present appellees, who were defendants in the county court proceeding, took an appeal to the Appellate Court, and

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the latter Court, on January 22, 1890, reversed the order of the county court, and remanded the cause with directions that an order be entered, "allowing the execution of Kaufman Bros. & Co. priority out of the proceeds of the goods levied on," and that said Kaufman Bros. & Co. should recover their costs from the assignee. From such judgment of the Appellate Court reversing the order of the county court, the present appeal is prosecuted.

The judgment by confession for \$16,217.70 was entered upon two judgment notes, one for \$2500.00 and the other for \$13,717.70, both dated November 15, 1888, and executed on that day, both payable on demand after date to the order of Kaufman Bros. & Co., and both having the signature thereto of the firm of Sues & Uhlendorf. It is not disputed that these notes were given for a good and valid consideration. They represented money borrowed of the appellees by Sues & Uhlendorf and goods sold by the former to the latter. Even Uhlendorf, who made a motion on November 28, 1888, to set aside the judgment by confession, says in his affidavit filed in the Superior Court in support of that motion, "that the indebtedness provided for in said note (notes) is a valid one." Nor is it denied, so far as we have been able to discover, that the indebtedness represented by the notes was the firm indebtedness of Sues & Uhlendorf, and not the individual indebtedness of either member of the firm. It is to be noted, that the warrant of attorney to confess judgment is a part of each one of the notes; that is to say, there is not one signature of the firm to the note for \$2500.00 and another signature to the warrant of attorney to confess judgment on that note; one signature follows the warrant of attorney and was intended to apply to both the note and the warrant. The same is true of the note for \$13,717.70. If, as is claimed by the appellants, Sues alone signed the firm name, and if he had no power to sign the firm name to the warrant of attorney to confess judgment, he certainly had the power to sign the note. He was

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the financial and managing partner while Uhlendorf was the travelling partner, absent most of the time soliciting business. One partner may sign the firm name to a note given in the ordinary course of business for a firm debt.

With these preliminary explanations we proceed to consider the main ground upon which the county court held the notes and judgment and the execution and levy thereunder to constitute a fraudulent preference. The view of that court was, that the notes were executed and delivered after Sues & Uhlendorf had made up their minds to make an assignment and had entered upon that determination. In *Field et al. v. Geohegan et al.* 125 Ill. 68, it appeared from the evidence, that the debtor firm, more than thirty days before making a general assignment for creditors, gave to certain creditors notes with warrants of attorney for the confession of judgments thereon, that the judgments, however, were not entered until the day of the assignment, that executions were placed in the officer's hands just before the execution and recording of the assignment, but no question was made as to the validity and sufficiency of the judgment notes, and the debtors, at the time of giving such notes, were not contemplating making an assignment; and, under this state of facts, it was *held*, that the lien of the executions issued upon the judgments was prior to that of the assignee or the other general creditors.

The doctrine of the *Geohegan* case is applicable to the case at bar, and the main question involved is the question of fact, whether or not Sues & Uhlendorf contemplated making an assignment at the time when they executed and delivered to appellees the notes upon which the judgments were entered.

As has already been stated, the judgment notes were executed on November 15, 1888, and, assuming for the present that they were delivered to the appellees on that day, we cannot construe the evidence as showing that any assignment was determined upon before November 27, 1888, the day on which the judgment was entered up. To this effect is the testimony

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of Lachenbruch, one of the creditors, of Furthman, the attorney, and of both the debtors, Uhlendorf and Sues. It is true that in his testimony upon the final hearing, Sues seeks to convey a contrary impression, but, in an earlier examination upon the original citation, he swore as follows: "Mr. Sues, at the time of the giving of either of these judgment notes and the signing of them had you and your partner had any conference on the subject of making an assignment? No Sir. Had you, at either time, concluded to make an assignment? No Sir. Was the matter of an assignment discussed at all until after the 25th of November? It was discussed on the day of their entering up the judgment. That was the first time an assignment was discussed." In another portion of the record we find the following testimony given by Sues at another time: "When these notes were executed on the 15th of November, Mr. Sues, was it your intention to make an assignment? At that time, the 15th of November, No Sir. You didn't think of making an assignment until the morning of the 27th Nov. did you? A. It is hard to say about that. * * * I suppose it had been in my head *for three days previous to that*. The last coming of Mr. Lachenbruch was the thing that probably put it in my head more than anything else." Many circumstances tend to confirm this testimony. The firm continued to do business after November 15 and up to November 27, borrowing \$2100.00 on November 21, and trying to borrow \$700.00 of the appellees as late as November 26.

It is sought, however, to break the force of the testimony that no assignment was resolved upon until November 27 by claiming that the notes, though executed on the 15th of November, were placed in escrow in the hands of Furthman on that day, and were not actually delivered to the appellees until the 27th. If this were true, the proof shows that, even on the 27th, the assignment was not finally determined upon until Lachenbruch had received the notes from Furthman on the

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morning of that day, and had employed another attorney, and entered up judgment; but the claim so made is not sustained by the evidence.

Lachenbruch and Furthman both swear positively that there was an absolute delivery of the notes to the appellees on November 15, and that there was no arrangement under which Furthman was to hold them in *escrow* subject to the order of Sues & Uhlendorf. On that day, a meeting was held between the parties at the Leland Hotel in Chicago. When the notes were signed by Sues, they were handed to Lachenbruch, as the representative of the appellees, and Lachenbruch handed them to Furthman, as the attorney of the appellees, to hold subject to instructions from Kaufman Bros. & Co. The same contradictions exist in the testimony of Sues in regard to this matter, as in regard to the subject of making the assignment. Katz, who was an agent of the appellees as well as of other creditors of Sues & Uhlendorf, merely states what Sues told him after the execution of the notes. In October, judgment notes had been executed by Sues & Uhlendorf to appellees to secure this same indebtedness, and the October notes were taken up on November 15 and the two notes of that date were substituted for the old notes. The very object, which Lachenbruch had in view in coming to Chicago on November 15, was to better the securities of his firm, because the October notes were not demand notes and had been deposited in *escrow* subject to the orders of Sues & Uhlendorf. New notes were taken for the express purpose of doing away with those features of the old notes which rendered them less valuable as securities.

We have made a careful examination of the evidence in view of the earnest contention of counsel, and have reached the conclusion that the notes were executed and delivered to the appellees before the makers had made up their minds, or entered upon any determination, to make an assignment. In the *Geohegan* case, *supra*, the judgments were entered, as here, on the same day on which the assignment was made, and the

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executions were issued and delivered to the sheriff only a short time before the assignment was executed and filed for record. As it was said there, so may it be said here: "the Act does not interfere with the action of the debtor while he retains the dominion of his property. He may in good faith sell his property, mortgage or pledge it to secure a *bona fide* debt, or create a lien upon it by operation of law—as, by confessing a judgment in favor of a *bona fide* creditor. * * * But the debtors had nothing to do with the entry of judgments. They did not dictate or determine the time when judgments should be entered. * * * A creditor always has a right to take every precaution to save or secure his debt, and the fact that he delays until the debtor may be on the eve of bankruptcy, is no argument against the good faith of his acts."

But it was set up in the petition of appellant Hier, as filed in the county court, and it is here urged with great force, that the judgment of appellees cannot be regarded as a valid lien upon the property levied upon for the alleged reason that Sues alone, without any authority from Uhlendorf, signed the firm name of Sues & Uhlendorf to the powers of attorney to confess judgments upon the notes. It is admitted that the judgment is valid as against Sues, but it is claimed that it is void as against Uhlendorf, and, therefore, can only be a lien upon the individual interest of Sues in the firm property levied upon, which interest, after the payment of the firm debts, will amount to nothing.

In *Sloo v. State Bank of Illinois*, 1 Scam. 428, this Court decided that one partner cannot execute a warrant of attorney to confess a judgment in the name of the firm without express authority from the other partner, or a ratification of the act by the latter. (See also *Martin v. Judd*, 60 Ill. 78.)

It is to be noted that the judgment by confession in this case was not entered before the clerk in vacation, but in open court in term time, and the record of the judgment recites that the defendants Henry Sues and Lebrecht Uhlendorf appeared

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by their attorney, etc., and that the execution of the warrant of attorney was "duly proven."

It is also to be noted, that the judgment notes given in October were signed by Sues alone in the firm name with the assent of Uhlendorf, and that Lachenbruch was a witness of such act on the part of Sues performed in the presence of Uhlendorf and without objection from the latter. If the decision of this matter depended upon the question of fact whether Sues had authority from his partner to sign the firm name to the warrant of attorney, there are many circumstances from which such authority might be reasonably implied. Upon other grounds, however, the objection here made to the judgment cannot be held to be tenable.

If the county court had any power to set aside the judgment because the court of law which rendered it had no jurisdiction over the person of one of the judgment debtors for the want of service of process upon him, such power must be regarded as resting upon; and having its basis in, some sort of equitable jurisdiction supposed to be vested in the county court by the Assignment Act. This court has decided in *Colson v. Leitch*, 110 Ill. 504, that "a court of equity will not enjoin a judgment at law where there has been no service, unless it is alleged and proved that, if the relief be granted, a different result will be obtained than that already adjudged by the void judgment." Such relief will not be granted, if it appears, as it does appear in the case at bar, that the debtor owes the amount of the judgment, and has no defense, either legal or equitable, to the debt for which the judgment is rendered. The same doctrine is announced by Freeman in his work on Judgments (sec. 498) where it is said: "the better established rule undoubtedly is, that notwithstanding an alleged want of service of process, a court of equity will not interfere to set aside a judgment until it appears that the result will be other or different from that already reached."

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This principle applies not only where the application to set aside the judgment is made by the debtor, who claims that he was not served with process, or gave no authority to confess judgment, but also where such application is made by a creditor or other third person. (*Martin v. Judd*, 60 Ill. 78.)

But, as we read the record, the county court, in the present case, set aside the judgment solely upon the ground that it operated as an unlawful preference in contravention of the assignment act; that court did not assume to pass upon the validity of the judgment as affected by the alleged want of authority of Sues to sign the firm name to the warrant of attorney. On the contrary, its final decree treats the judgment as valid and subsisting. That decree is interpreted by counsel for appellants in the following language made use of in their supplemental brief: "the court denied defendants' alleged right of priority in the distribution of the assets, * * * but allowed the judgment to stand in proof of appellees' claim and to share in the distribution of the estate *pro rata* with other legally proven claims."

The judgment by confession against Sues & Uhlendorf was rendered by the Superior Court of Cook County and an execution from that court was levied upon the property before the appointment of an assignee. We have held, in a number of cases, that a court of law exercises an equitable jurisdiction over a judgment by confession; that, where there is a want of service, or an absence of authority to confess, the debtor will not be driven into a court of chancery, but may move to set aside the judgment before the court of law which rendered it; that such court of law may open the judgment and permit the debtor to present his defense to the claim if he has any, but will at the same time protect the creditor by permitting the judgment to stand as security; in such cases, the proceedings on the judgment are merely stayed; the enforcement of the plaintiff's lien is suspended, but the lien is fully preserved; if the defense is successful, the judgment falls; if otherwise,

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the judgment is to be enforced. (*Lyon v. Boilvin*, 2 Gilm. 629; *Lake v. Cook*, 15 Ill. 353; *Norton v. Allen*, 69 id. 306; *Condon v. Besse*, 86 id. 159; *Truett v. Wainwright*, 4 Gilm. 411.)

The record in the case at bar shows, that on November 28, 1888, Uhlendorf made a motion in the Superior Court to have the judgment set aside, and that that court made an order giving him time to plead, and requiring the judgment to stand as security. The record further shows that Uhlendorf appeared by attorney and filed pleas to the action. Whether the issue formed by the pleas thus filed has ever been disposed of does not appear. In the exercise of its equitable jurisdiction the Superior Court opened the judgment to permit Uhlendorf to make defense, but merely suspended the enforcement of the lien until the defense should be passed upon.

The assignee took the property subject to the lien of the judgment, as above stated. When the Superior Court stayed proceedings on the judgment to let in the defense, the assignee still held the property, or its proceeds, subject to the lien. The determination of the issue formed by the pleas was a matter exclusively within the jurisdiction of the Superior Court. (*Paddock v. Stout*, 121 Ill. 571.) If there was no unlawful preference such as is condemned by the assignment Act, then the assignee held the fund subject to the result of the proceeding in the Superior Court. If that proceeding, which the present record shows to be still pending, results in favor of the plaintiffs, the appellees here, then the suspended lien will take effect as of the date of the original levy of the execution, but if it results in favor of the defendant Uhlendorf, the appellees will not be entitled to the priority here claimed.

We are, therefore, of the opinion that the judgment of the Appellate Court is correct in reversing the order of the County Court and remanding the cause, but the judgment should be so far modified as to remand the cause to the County Court with directions to await the result of the pending proceeding

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in the Superior Court, and, when such proceeding is ended, to allow the execution of the appellees to have priority out of the proceeds of the goods levied upon if the result is favorable to them, but if otherwise, to distribute such proceeds *pro rata* among the firm creditors.

The judgment of the Appellate Court is accordingly affirmed in so far as it reverses the decree of the county court and remands the cause, but the cause is remanded back to the Appellate Court with directions to modify its judgment in the manner herein specified.

Judgment affirmed, modified and remanded.

134	228
42a	101
134	228
50a	426

184	228
188	443
184	228
193	1101
134	228
206	1416
106a	426

THE UNION MUTUAL ACCIDENT ASSOCIATION

v.

MINNA FROHARD.

Filed at Ottawa October 31, 1890.

1. **INSURANCE—life insurance policy—rule of construction.** The words selected and used by a life insurance corporation in its policy or contract with the assured, are to be interpreted most strongly against the company. At all events, they are to be construed according to their common and literal meaning, in favor of the insured.

2. **SAME—accident certificate—injury in an "occupation" other than that specified.** The by-laws of a mutual benefit accident association provided for the payment to the beneficiaries of certain sums on the death of members, ranging from \$5000 to \$500, according to the occupation of the member. A member took a certificate as a merchant, which called for \$5000 on his death. He was killed from an accidental shot while hunting for recreation. The sum paid on the death of a hunter was only \$500. It was provided in the by-laws, that any member receiving an injury "while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury:" *Held*, that the word "occupation," as found in the by-laws, had reference to the vocation, profession, trade or calling in which the assured was engaged for hire or profit, and did

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not preclude him from the performance of acts and duties which were simply incidents connected with the daily life of men in any and all pursuits, and that the beneficiary was entitled to \$5000.

3. *SAME—accident while engaged in "any act or occupation" not within the terms of the certificate.* In the same certificate it was stipulated "that in the event of the member being either fatally injured or otherwise disabled while engaged, temporarily or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association, * * * then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full." *Held*, that the words "in any act," in the clause above, did not give the certificate any different meaning than it would have without them; and the fact that the member lost his life by an accident while hunting for recreation, did not reduce the sum agreed to be paid from that therein provided.

4. *SAME—accident beneficiary—amount to be paid—cost of collecting assessments.* The by-laws of a mutual accident association provided, that on the death of a member leaving a liability on it, the secretary should make an assessment of two dollars upon each of its members belonging at the time of the death, if there should not be enough money in the treasury to discharge such liability, and that such sum, less ten per cent for expenses, should be paid to the beneficiary in full: *Held*, that the amount due a beneficiary is, primarily, payable out of "moneys in the treasury," and if the sum in the treasury is not sufficient to pay the full amount of the claim, then an assessment of two dollars upon each member is to be made and collected, and if this, when collected, is sufficient to pay both the expenses of collection and the amount of the claim, then the beneficiary is to be paid in full, otherwise he is entitled to what is left after deducting the ten per cent.

5. *SAME—relief to beneficiary—character and extent.* Where it appeared that the officers of a mutual insurance company might, by the levy of two dollars upon each of its members, as it was their duty to do, have paid a certificate given to a member, but that they wrongfully refused to make such assessment until it was doubtful whether enough could be realized thereby, a court of equity, in its decree in favor of the beneficiary, directed the corporation and its officers to levy and collect an assessment of two dollars per member, and pay the same to such beneficiary, and decreed that such company and its officers should pay any deficiency there might be in the collection of the assessments.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Brief for the Appellee.

Mr. JOHN M. HAMILTON, and Mr. CHARLES C. GILBERT, for the appellant.

Messrs. HAMLINE & SCOTT, for the appellee :

Engaging in an act which is, or may be at times, engaged in by men of any occupation or profession, is not changing occupation, within the meaning of the contract. *Admrs. of Stone v. Casualty Co.* 34 N. J. 371; *Accident Co. v. Burroughs*, 69 Pa. St. 43.

To make effective a provision of the certificate limiting the amount to be paid in case the insured should be killed while engaged in any act classed as more hazardous than that in which he was insured, the association should have made a classification of acts, which it did not do. Payment, as provided both by the by-laws and certificate, was to be according to the rate of the occupation in which the member was engaged. The word "act" was not used in that connection. The contract will be construed most strongly against the association. *Aid Association v. Wanner*, 24 Ill. App. 363; *Admrs. of Stone v. Casualty Co.* 34 N. J. 371; *District Grand Lodge v. Cohn*, 20 Bradw. 335.

It having been stipulated that the number of members liable to contribute was more than sufficient to make up the full amount of \$5000 by payment of one regular assessment, if members would all pay, the court properly decreed that the full sum be paid. *Suppiger v. Benefit Co.* 20 Bradw. 599.

In the absence of proof as to the amount to be realized by one assessment, and of defendant's ability to show what would have been realized from such assessment, and the plaintiff's inability to do so, it will be presumed the assessment would have realized the full amount. *O'Brien v. Benefit Society*, 46 Hun, 429; *Protective Union v. Whitt*, 36 Kan. 761; *Aid Association v. Wanner*, 24 Ill. App. 357; *Lueder's Exrs. v. Life and Annuity Co.* 12 Fed. Rep. 465; *Aid Association v. Riddell*, 91

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Ind. 84; *Neskern v. Legacy Association*, 30 Minn. 406; *Freeman v. Benefit Society*, 42 Hun, 252.

The decree against the association for the deficiency was proper. *Swett v. Aid Association*, 78 Me. 541; *O'Brien v. Benefit Society*, 46 Hun, 426; *Benefit Association v. Sears*, 114 Ill. 108.

An association failing to levy an assessment is a wrongdoer, and can not take advantage of its own wrong by asserting that members might not have paid. *Freeman v. Benefit Society*, 42 Hun, 252.

Joining in the decree with the association "its proper officers" was not error; but had it been, appellant, not being injured thereby, can not take advantage of such error. *Hannas v. Hannas*, 110 Ill. 53; *Brown v. Miner*, 21 Ill. App. 60.

Mr. JUSTICE BAKER delivered the opinion of the Court:

On the first day of September, 1885, one John Frohard was accepted as a member of the Union Mutual Accident Association, and a certificate of insurance was issued to him. On January 26, 1887, while hunting with a gun, he accidentally shot and killed himself. The appellee, Minna Frohard, who is his widow, and the beneficiary named in the certificate, filed this bill in equity against the corporation, for the purpose of compelling it to levy an assessment of two dollars for each member of the association liable at the date of the accident, for the purpose of paying the amount of \$5000 specified in the certificate, or such part thereof as might be collected on the assessment, and praying also for general relief, and that in the event there was a deficiency in the amount collected on the assessment, the corporation and its officers be decreed to pay the difference between the amount so collected and \$5000. Answer and replication having been filed, the cause was heard in the circuit court of Cook county, and that court found the allegations of the bill of complaint to be true, and entered a

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decree in conformity with the special prayers thereof. The decree was affirmed, on appeal, in the Appellate Court for the First District, and the record was brought to this court by a further appeal.

Section 2 of article 4 of the by-laws of appellant is as follows: "Any member who shall change his occupation to any other more hazardous than the one in which he was classified when insured, shall immediately notify the secretary of such change; and any member receiving an injury while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury,—and such shall be payment in full upon the part of the company."

Article 14 of the by-laws classified certificates of insurance against accidents, and placed them in six divisions, designated, respectively, as A, B, C, D, E and F. This classification purported to be, and was, solely upon the basis of occupations, the least hazardous occupations being placed in division "A," the extra-hazardous occupations in division "F," and other occupations in one or another of the intermediate divisions. It was provided in said article, that in the event of the death by accident of a member in division "A," a sum not exceeding \$5000 should be paid, and that in the event of such death of a member of division "E," which was designated therein as "hazardous," a sum not exceeding \$1000 should be paid. Merchants were placed in division "A," and hunters in division "E." A claim is also made by appellant, that subsequent to the issuance of the certificate here in controversy, and prior to the death of John Frohard, a change was made in its by-laws, whereby the amount to be paid to a beneficiary in case of the death by accident of a member in division "E" was reduced from \$1000 to \$500.

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The certificate or policy of insurance which was issued to John Frohard provided, among other things, as follows: "That John Frohard, by occupation, profession or employment a merchant, residing at Sparta, State of Illinois, is accepted as a member in division 'A' of said association, subject to all the requirements and entitled to all the benefits thereof, as provided in the by-laws; and that said member, in case of death occurring through external, violent and accidental injuries, is entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of \$5000, which sum, or such a part thereof as may be collected for that purpose by the payment of one regular assessment of two dollars (\$2) for each member of the association liable at the date of the accident, shall, within sixty (60) days after sufficient proofs have been received, be paid to his wife, Minna, if surviving.

* * * It is expressly stipulated and agreed, that in the event of the member being either fatally injured or otherwise disabled while engaged, temporarily or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association, (or, if not specially mentioned, approximating thereto,) then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full upon the part of the association. * * * It is expressly stipulated and agreed, that this certificate is issued and accepted subject to all the provisions, conditions, limitations and exceptions herein contained or referred to."

The principal contention of appellant is, that the deceased was killed while engaged, temporarily, in an act or occupation classed as more hazardous than the one in which he was accepted, and that appellee is therefore entitled to recover only the amount provided for such hazardous risk and occupation. The contention of appellee is, that there was no change of occupation, within the meaning of the by-laws and certificate

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of insurance. The deceased was a hardware merchant. He did not follow the occupation of a hunter for hire or profit. He was killed while engaged in the act of hunting as a recreation, and it does not appear that he had hunted with a gun on any occasion since the issuance of the policy, other than that upon which the accident occurred.

In our examination of the provisions of the by-laws and contract of insurance we will first ascertain the proper construction to be placed upon the former.

The language of section 2, as we have heretofore seen, is, "any member receiving an injury while engaged, temporarily or otherwise, in an occupation more hazardous than the one in which he was engaged when insured," etc. Occupation is defined by lexicographers to mean, "that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade." The classification of hazards in article 14 of the by-laws is made upon the basis of occupations. Merchants, and those following other vocations, are placed in division "A;" grain measurers and others in division "B;" paper hangers and others in division "C;" teamsters and others in division "D;" and boatmen and others in division "E." The by-laws in question must receive a reasonable construction. It would be unreasonable and absurd to hold that the merchant who at one time measured a few bushels of grain, at another hung a few rolls of wall paper upon his own premises, at another drove a team of horses in a carriage or wagon, and at still another rowed a skiff for exercise or recreation, became, within the true intent and meaning of these by-laws, at these several times, a grain measurer, a paper hanger, a teamster, and a boatman, respectively. The word "occupation," as found in these by-laws, must be held to have reference to the vocation, profession, trade or calling which the assured is engaged in for hire or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the

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daily life of men in any or all occupations, or from engaging in mere acts of exercise, diversion or recreation. This view is not subversive of the word "temporarily," found in said section 2, for there would be full opportunity for giving force and effect to it in the event a professional man, merchant, or person in some other calling, should temporarily abandon such vocation, and for purposes of profit, or as a means of gaining a subsistence, temporarily employ himself in some more hazardous occupation.

This construction of these by-laws seems to be sustained by the authorities. In *North American Life and Accident Ins. Co. v. Burroughs*, 69 Pa. St. 43, there were conditions in respect to the matter of a change of occupation, and the deceased was insured as an earthenware manufacturer. He received a fatal injury from an accident which happened while he was assisting in hauling hay on a farm, while he was on a visit to his grandfather, and it was held there was no change of occupation or business, within the meaning of the policy there involved. In *Stone's Admr. v. United States Casualty Co.* 34 N. J. 375, the language of the condition was: "Policy holders insured under the preferred class will not be entitled to recover for injuries received in any employment or by any exposure either more hazardous in itself, or classified by the company as more hazardous, than the occupations named in the preferred class." The deceased was insured as a teacher, but while overlooking the construction of a building he was having erected, fell from a second story and was killed; and it was held the language of the condition had respect to employments, and not to individual acts. See, also, *Miller et al. v. Travelers' Ins. Co.* 39 Minn. 548.

It is urged, however, that the contract of insurance contains the words, "in any act or occupation," instead of the mere words, "in another occupation," found in the by-laws, and that the words, "while engaged, temporarily or otherwise, in an act," can not be ignored, but that they have a definite and

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clear meaning, and must be given legal force and effect. It is to be noted that the words used in the contract are words selected and used by the corporation itself, and are therefore to be interpreted most strongly against it, or that, at all events, they are to be construed according to their common and literal meaning, in favor of the insured.

The provision of the policy upon which is based the claim that the demand of appellee is reduced from one under division "A" to one under division "E," is not simply that if the deceased was fatally injured "while engaged, temporarily or otherwise, in any act or occupation more hazardous than the one in which he was accepted," but contains the further requirement, that the "act or occupation" that will be effective to work such reduction must be one that is "classed as more hazardous, * * * according to the classification given by the rates and by-laws of the association." These words last quoted are words of limitation, pertaining to and qualifying the terms "any act" and "occupation," as used in the contract. We have already seen that the classification of hazards made in the by-laws is predicated only upon occupations. There is not in the by-laws or in the record any classification of hazards in respect to acts,—in other words, there is no act which is classified as more or less hazardous than another, and no act which is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased. The case, then, does not stand otherwise than it would if the word "act" were not found in the contract. The courts below properly held that the claim of appellee was under division "A," and was for \$5000.

The further point is made, that the court erred in decreeing that appellant and its proper officers immediately levy one regular assessment of two dollars upon each member of the association liable to contribute at the date of the death of the deceased, to-wit, January 26, 1887, and that upon collection of such assessment, appellant and its proper officers pay the

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amount realized thereon, to appellee, and in case the amount realized from such assessment shall not be sufficient to pay the full sum of \$5000, that the association and its proper officers pay the difference between the said sum of \$5000 and the amount so realized from such assessment, to appellee. In the event of the death of a member from a bodily injury for which a liability is imposed upon the corporation, section 1 of article 11 of its by-laws provides: "The secretary shall make assessment of two dollars upon all the members belonging at the time of happening of said injury, provided the amount in the treasury is not sufficient to pay said claim; and such amount so collected, less ten per cent for expenses, shall be paid to the beneficiary when collected, and shall be payment in full upon the part of the association, not to exceed the amount of the grade in which injury was received." The language of this by-law is awkward and ambiguous, and we must seek to give it a sensible and reasonable construction. As we understand it, the amount fixed for the grade or division in which the deceased member was at the time of the fatal injury is the amount due the beneficiary, and this is payable, primarily, out of moneys "in the treasury," and if the amount in the treasury is not sufficient to pay the full amount of the claim, then an assessment of two dollars upon each member liable is to be made and collected. If the amount so collected is sufficient to pay both the expenses of assessment and collection and the amount of the claim, then the beneficiary is to be paid that amount in full; but in the event the sum realized from the assessment is insufficient to pay both the claim and expenses, then ten per cent of the amount collected is to be retained by the corporation for expenses, and the residue, not to exceed the amount of the claim, is to be paid to the beneficiary, and is to be regarded as payment in full upon the part of the association.

Among the allegations in the bill of complaint of appellee were these, to-wit: "The amount in the treasury of said asso-

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ciation was not sufficient to pay the claim of your oratrix;" and, "at the time of the death of said deceased the membership of the said association liable to contribute to the payment due on account of the death of said deceased was more than sufficient to make up the full amount of \$5000, by the payment of one regular assessment of two dollars from each member of the association liable at the date of the accident." These allegations were not denied in the answer of appellant, nor was any claim made therein that an assessment made in accordance with the provisions of the certificate and by-laws would not have produced an amount of money sufficient to have paid in full both the claim of appellee and the expenses of the assessment and collection, nor was any showing whatever made therein, or by its evidence, in respect to the amount that could be collected from the members liable at the date of the death. Appellant merely tendered to appellee \$500 as payment in full of her demand, and wrongfully insisted that was all she was entitled to receive under the certificate of insurance.

The undertaking in the certificate was to pay \$5000, unless an assessment would not realize that amount; and at the hearing it was admitted by appellant that at the date of the death of the deceased there was not in the treasury of the association sufficient money to pay that amount to appellee, and also that at that date the number of members liable to contribute was more than sufficient to make up the full amount by the payment of one regular assessment on each member of the association liable to contribute, if the members liable would all pay said assessment. The number, names and localities of the members of the association, and their willingness and ability to pay assessments, were matters peculiarly within the knowledge of the corporation, and in respect to which appellee was necessarily unadvised, and the corporation alone had charge of the assessments, and knowledge what the expense of making and collecting an assessment would be,

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and it, better than any one else, had knowledge what amount of money an assessment of two dollars on each of its members would produce. If there were facts known to appellant which indicated a probability that if an assessment had been made as provided for in the contract and by-laws all the members liable to contribute would not have paid said assessment, then it should have alleged such facts in its answer, and established them by its evidence. If the circumstances were such that an assessment would not have realized a sufficient amount to satisfy the claim of appellee in full, it was a matter of defense that should have been set up by appellant in its pleadings, and proven at the hearing. It not having done so, the averments in the bill which were not denied in the answer, and the admissions of appellant introduced in evidence at the hearing, raised a presumption as against it, it having wrongfully refused to make an assessment in conformity with its contract and duty, that had such assessment been made, enough money would have been collected thereon to have paid in full the claim of appellee.

The views we have expressed on this branch of the case seem to be in substantial conformity with those held by other courts. *Elkhart, etc., Association v. Houghton*, 103 Ind. 286; *Kansas Protective Union v. Whitt*, 36 Kan. 760; *Kansas Protective Union v. Gardner*, 41 id. 397; *Bentz v. Northwestern Aid Ass.* 40 Minn. 202; *O'Brien v. Home Benefit Society*, 46 Hun, 426; 4 N. Y. Supp. 275.

We may assume, then, that if the assessment had been made for the benefit of appellee at the time it should have been made by the officers of the association, in the early part of the year 1887, it would have produced \$5000,—the full amount of her demand. It is at least probable that by reason of appellant's wrongful delay in making the assessment, the number of members who were at that time liable to contribute for the payment of her claim has materially decreased, and that the fund realized by an assessment made at a much later

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date will be insufficient to pay her in full. The loss, if any, occasioned by the delay, would not be owing to any fault of appellee, but would be directly traceable to the wrongful conduct of appellant. It was but equitable and just, therefore, that the decree entered in the cause required that in the event of a deficiency in the amount realized from the assessment made in conformity with the decree, appellant should pay to appellee the difference between \$5000 and the amount realized.

We find no manifest error in the record, and the judgment of the Appellate Court is affirmed.

Judgment affirmed.

AUGUST H. SCHARF

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon June 13, 1890.

1. *APPEAL—in proceeding in bastardy.* A judgment against the putative father in a proceeding in bastardy, under the statute, is necessarily less than \$1000. So, in the absence of a certificate of importance, no appeal will lie from the judgment of the Appellate Court in such proceeding, to this court.

2. *SAME—proceeding in bastardy—of its nature—whether included in the proviso to the 8th section of the Appellate Court act.* The special remedy provided by the Bastardy act is not “an action *ex contractu*,” nor is the foundation of the right of recovery a “penalty,” in the sense in which those terms are used in the eighth section of the Appellate Court act.

3. *SAME—former decision.* The rule in that regard, as announced in *Rawlings v. The People*, 102 Ill. 475, is not adhered to.

4. *PROCEEDING IN BASTARDY—civil or criminal.* A proceeding in bastardy is a civil and not a criminal proceeding. In form it is criminal, but it is essentially of the nature of a civil action to compel a putative father to help support his offspring.

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135	430
134	240
137	601
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140	538
40a	79
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47a	512
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57a	323

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APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Bond county; the Hon. AMOS WATTS, Judge, presiding.

MESSRS. LANE & COOPER, for the appellant.

MESSRS. VAN HOOREBEKE & NORTHCOTT, for the People.

MR. JUSTICE SHOPE delivered the opinion of the Court:

This was a proceeding under the Bastardy act, instituted in the county court of Bond county, where, upon trial by a jury, the defendant was found to be the father of the child, and judgment rendered, requiring him to contribute to its support, under the statute. On appeal to the circuit court a trial *de novo* was had, a like verdict rendered, and the defendant adjudged to pay the sum of \$50 for the support of the child, it having in the meantime died. On appeal to the Appellate Court the judgment of the circuit court was affirmed. The putative father prosecutes this appeal from the judgment of the Appellate Court.

At the threshold we are confronted with the question of the jurisdiction of this court to entertain the appeal, the amount of recovery, or that could in any event be recovered in the action, being less than \$1000, and no certificate of importance having been granted by the Appellate Court, in conformity with the statute. We are aware that in the case of *Rawlings v. The People*, 102 Ill. 475, it was held, by a divided court, that the recovery "is so much in the nature of a penalty that the case is not included in the class of non-appealable cases when the amount involved is less than \$1000;" and it was said that this class of cases comes within the meaning of the proviso to the eighth section of the Appellate Court act, excluding actions involving a penalty from the operation of the rule prescribed by that section in actions *ex contractu*. So

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much of the section referred to as is important to be considered is as follows :

"In all cases determined in said Appellate Courts, in actions *ex contractu*, wherein the amount involved is less than \$1000, exclusive of costs, and in all cases sounding in damages wherein the judgment of the court below is less than \$1000, exclusive of costs, and the judgment is affirmed * * * in the Appellate Court, the judgment, order or decree of the Appellate Court shall be final, and no appeal shall lie or writ of error be prosecuted therefrom: *Provided*, the term *ex contractu*, as used in this section, shall not be construed to include actions involving a penalty. In all other cases appeals shall lie, etc., from the Appellate to the Supreme Court."

Obviously, the proviso was inserted to exclude cases where actions *ex contractu* were brought to recover a penalty imposed by some penal law of the State,—as, actions of debt to recover the penalty under the Drover's act, or under the Medical Practice act, and like cases. Technically, the action of debt is an action *ex contractu*, although brought to recover a penalty imposed by statute; and the legislature, having used the term "actions *ex contractu*," provide that that term, as used, should not apply to actions *ex contractu* where such penalty is involved. It must be manifest that the proviso can have application only where the action is *ex contractu*. If, therefore, in any case, the action is not *ex contractu*, the proviso has no application, and the case is not excluded from the effect of the provisions of the act. By the proviso, "the term *ex contractu*, as used in this section," is not to be construed to include actions involving a penalty, and, being thus limited, can not be held to relate to other actions for a penalty not *ex contractu*.

But conceding that the exception out of the statute might relate to actions other than actions *ex contractu*, we are not prepared to adopt the reasoning in the *Rawlings case*, *supra*, or adhere to the rule there announced. It has been repeatedly

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held that proceedings under the Bastardy act are civil and not criminal cases, so it is clear that no writ of error lies under the provisions relating to writs of error in criminal cases. Indeed, this case comes to this court by appeal, in recognition of that rule.

Nor are we prepared to hold that the proceeding is for the recovery of a penalty. It is said in the *Rawlings* case: "It is well settled by the decisions of this court that a prosecution under the Bastardy act is a civil and not a criminal proceeding,—that, though in form criminal, it is essentially of the nature of a civil action, the object being, not the imposition of a penalty for an immoral act, but merely to compel the putative father to contribute to the support of his illegitimate child." We approve of this holding, which has been announced in many cases by this court. See *Mann v. The People*, 35 Ill. 467; *Pease v. Hubbard*, 37 id. 257; *Maloney v. The People*, 38 id. 62; *The People v. Noxon*, 40 id. 30; *Allison v. The People*, 45 id. 37; *The People v. Starr*, 50 id. 52; *McCoy v. The People*, 71 id. 111; *Kolbe v. The People*, 85 id. 336; *Mings v. The People*, 111 id. 98.

This question was presented to the court in these cases in various forms, and in each instance the effect of the decision has been to hold that they were simply of a civil nature, to compel the putative father to contribute to the support of his illegitimate child. And such are the provisions of the Bastardy act, (secs. 8 and 10)—that is, the money is to be paid for the support, maintenance and education of the child. Yet it has been repeatedly held that the mother of the child might settle, and release the defendant at any stage of the proceeding, the recovery being for her benefit, to assist in the nurture of the child. We said in *Pease v. Hubbard*, *supra*: "Although it is a proceeding in the name of the People, yet the object is not the imposition of a penalty for an immoral act, but merely to compel the putative father to provide for the support of his

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offspring;" and it was there held that the mother could maintain an action against the officer for escape of the putative father. In *Hauskins v. The People*, 82 Ill. 193, we said: "The foundation of the action is not to punish a defendant for an immoral or unlawful act, but to compel a father to contribute to the support of his offspring;" and it was held, that as the maintenance devolved upon the mother, the money would go to her to reimburse her for advances made, and that the fact that the child had died before trial, did not, for that reason, abate the proceeding.

Farther citation from cases need not be made, but an examination of them will show that the uniform holding is, that the amount required by the statute to be paid is not intended as a punishment or penalty for an immoral or unlawful act. It is a right, given by the statute, to recover such sum, not exceeding the amount prescribed, as may be found necessary to support his offspring. It can no more be said to be in the nature of a penalty than it can be said that the right given by the statute to the widow and next of kin to recover for personal injuries in case of death of the person injured is in the nature of a penalty. One statute provides, that in case of death a sum not exceeding \$5000 may be recovered in a common law form of action, for the benefit of the widow or next of kin; the other statute provides, that in the contingency provided for therein, an amount not exceeding the sum mentioned in the statute may be recovered in the proceeding therein provided for, for the support, maintenance and education of the illegitimate child. If, as we have held in so many cases, the object of the statute is not the imposition of a penalty for any immoral or illegal act, but merely to give a civil remedy to recover for the support of the offspring, in respect to which the father owes at least the moral duty of maintenance, how can it be said to be in the nature of a penalty? Under the statute, (*Starr & Curtis*, 1732,) persons are required to support their relatives

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who are unable to earn a livelihood, the duty devolving upon them in the order named in the statute; yet it has never been supposed that this liability was the imposition of a penalty, or that it was in the nature of a penalty. The effect of the Bastardy act is simply to extend the principle so frequently applied at common law, (of which the statute before referred to is declaratory,) of the duty of the parent to support and maintain the offspring. Other illustrations might be given, but what has preceded must suffice.

Again, in *Kolbe v. The People*, 85 Ill. 336, it was held, that the main purpose of the statute was to compel the father of the bastard child to bear part of the burden of its support, in which the mother was chiefly interested; and if a child was begotten in Missouri, where the mother and putative father then resided, but who subsequently removed into this State during pregnancy, a prosecution could be maintained under the laws of this State. In the subsequent case of *Mings v. The People*, 111 Ill. 98, the doctrine of the *Kolbe case* was adhered to, and applied to a case where the mother and child were both non-residents of this State, and it was held, that notwithstanding such non-residence she might, under our statute, proceed in the courts of this State against the putative father. It must be manifest, if the statute is penal, that no conviction could have been had in either of said cases for a penalty incurred while neither of the parties was within this State, or subject to its jurisdiction.

Not only in the matter of substance has the rule been as stated, but in all the forms of procedure, except in the character of action brought and mode of execution, the proceeding has been treated as civil. The quantum of evidence necessary to sustain the action is that applied to the recovery of debts or to the recovery of penalties. Ordinarily, where penalties are imposed for the violation of law, except in actions *qui tam*, the entire recovery is paid to the school fund, or for some

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other designated public use, and any person may institute proceedings for their recovery. In cases of this kind the mother can alone prosecute, and the money recovered must be paid to her for the support of the child, while in her custody. Nor can it be said that the method of enforcing the payment gives the recovery the character or nature of a penalty, any more than the same can be said of any action commenced by *ca. sa.* In either case, the procedure relates to the remedy, and not to the cause of action, although applicable only in the cases provided by law.

It is clear that the special remedy provided by the Bastardy act is not an action *ex contractu*, within the meaning of that term as used in the eighth section of the Appellate Court act, as it must also be that the foundation of the right of recovery bears no resemblance to a penalty. The object is not to punish for immorality or vice, or to impose a penalty for an unlawful act, but to provide a remedy for the enforcement of a legal obligation to support and maintain the bastard child.

It is important that cases of this character should be placed where they belong. The defendant is permitted the verdict of two juries, and the right to appeal to the Appellate Court, and no reason can be assigned why cases under this act should be taken out of the general rule applicable to cases where a like amount is involved. If questions of importance shall arise, and the proper certificate be made, an appeal to this court may be taken; but the amount recovered in the court below being less than \$1000, exclusive of costs, and no certificate having been granted, the judgment of the Appellate Court is in this case final.

The appeal to this court will be dismissed.

Appeal dismissed.

Syllabus.

CHARLES W. PARDRIDGE *et al.*

v.

PATRICK F. RYAN.

Filed at Ottawa October 31, 1890.

1. **CHANGING FORM OF ACTION**—*by the court—on its own motion—against the party's protest.* After an action of assumpsit had been once tried, and the judgment reversed and the cause remanded, and the parties had made their opening statements to the jury, the court, on its own motion, and against the plaintiff's protest, discharged the jury, and ordered that the action be changed to an action of account, and that the parties account each with the other, and appointed an auditor to take the account: *Held*, that the course pursued by the trial court was irregular, and arbitrary in the extreme.

2. **ACTION OF ACCOUNT**—*judgment quod computet.* In an action of account, an interlocutory judgment *quod computet* is always entered before the final judgment upon the findings of the auditors. This judgment merely determines the defendant's liability to account, but determines nothing as to what may be due after account taken. If the liability to account is denied, the issue may be tried before a jury.

3. In this case, which was in assumpsit, the court, on its own motion, ordered that the form of action be changed to account, and the record showed that the defendant made no objection to the proceeding, and stated that he was willing to account, and asked that plaintiff should also account, whereupon the court appointed an auditor, and ordered that each party account with the other: *Held*, that the order directing an accounting might be regarded as a judgment *quod computet*.

4. **SAME—oath of auditor—waiver.** The requirement that an auditor, in an action of account, shall be sworn before entering upon his duties, is not jurisdictional, but is one that may be waived by the parties; and the appearance of the parties before the auditor, and the examination of witnesses, without objection that he is not sworn, will constitute such waiver.

5. The fact that one appointed an auditor in an action of account is also a master in chancery of the same court in which the action at law is pending, will not relieve him of the necessity of being sworn, if there be no waiver of the oath, before entering upon the discharge of his duties.

6. **SAME—improper evidence before auditor—effect upon the auditor's finding.** The admission of incompetent or improper evidence before an auditor, in an action of account, will not require the court to set

134	247
186	511
184	247
77a	82
134	247
179	518
184	247
f188	*518
184	247
200	*428
184	247
111a	*49

Briefs of Counsel.

aside the report, when there appears sufficient competent evidence to sustain the auditor's finding.

7. ASSIGNMENT OF ERROR—*order entered by consent.* Where the defendant in an action of assumpsit assents to an order made by the court on its own motion, changing the form of action to that of account, and makes no objection to the appointment of an auditor or the taking of an account, he will be estopped from assigning such action of the court for error. He will be estopped from complaining of what he agreed to in the court below.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. BRANDT & HOFFMAN, for the appellants:

As to the practice in the action of account, see *Crousillat v. McCall*, 5 Binn. 433; *Lee v. Abrams*, 12 Ill. 11; *Spencer v. Usher*, 2 Day, 116; 1 Bacon's Abr. 38.

There were no pleadings in the case upon which a judgment could be entered.

The auditor was not sworn. This was error. *Watt v. Huse*, 38 Mo. 212; *Toler v. Hayden*, 18 id. 400; *Inslee v. Flagg*, 2 Dutch. 368; *Coombs v. Little*, 3 Green's Ch. 310; *Overton v. Alpha*, 13 La. Ann. 558; *Tile v. Barnett*, 2 Bibb, 166; *Reeves v. Goff*, 1 Penn. 133; *Parker v. Cramer*, id. 253; *French v. Mosley*, 1 Litt. 248; *Low v. Nolte*, 15 Ill. 368.

Messrs. DUNCAN & GILBERT, for the appellee:

Appellants are barred by their own acts to question the pleadings. There are no formal pleadings before the auditor. Rev. Stat. chap. 2, secs. 6, 16; *Hawley v. Burd*, 6 Bradw. 454; *Culver v. Elwell*, 73 Ill. 536; *Lockwood v. Doane*, 107 id. 235.

A party consenting to a reference is concluded by the order for it. *Armstrong v. Percy*, 5 Wend. 535; *Smith v. Minion*, 1 Coxe, 16.

The oath of the auditor was waived, not only by the silence and acquiescence of appellants, but also by the affirmative

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avowal of appellants' counsel that he waived all formalities, at the time when the auditor was first put in motion at the request of said counsel.

An award of arbitrators is not void because they are not sworn. This oath may be waived. *Howard v. Sexton*, 1 Denio, 440; 4 Com. 157; *Browning v. Wheeler*, 24 Wend. 258; *Hill v. Taylor*, 15 Wis. 190; *Tucker v. Allen*, 47 Mo. 488; *Railroad Co. v. McKinley*, 64 Ill. 338; *Edwards v. Edwards*, 31 id. 474; *Cornelius v. Boucher Bros.* 32 Edw. Ref. 107; Morse on Arbitration and Award, 172.

There was ample unobjectionable evidence to sustain the judgment. *Schræder v. Harvey*, 75 Ill. 638.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

The appellants are merchants in Chicago. From February, 1875, to October 11, 1880, they had their main store on State Street in that city, and a branch store, known as the New York Store, on West Madison Street. It is claimed by appellee, that, during said period, he was manager of the New York Store under an agreement with the appellants that he should have a certain weekly salary, and that, in addition thereto, he should have a certain proportion of the net profits of the business, as soon as the stock of goods on hand in February, 1875, should be paid for out of the profits. He left the service of the appellants on October 11, 1880, and brought the present suit against them in the Superior Court of Cook County on November 20, 1880.

The action, as originally brought, was assumpsit with a declaration containing the ordinary common counts, to which a plea of the general issue was filed. In this shape the case was tried before a jury in January, 1883, resulting in a verdict and judgment for \$11,450.00 in favor of appellee as plaintiff below. This judgment was reversed by the Appellate Court, as will be seen by reference to *Partridge et al. v. Ryan*, 14

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Bradw. 598, and the cause was remanded back to the Superior Court. On March 20, 1885, the defendants filed a plea of set off for money paid, money had and received, money loaned and money paid by mistake, to which plea the plaintiff filed a general replication.

On October 8, 1888, the cause came on for a second trial, and, after the jury had been impanelled and sworn and the counsel on both sides had made their opening statements, certain proceedings were had which will be shown by the following order then and there entered, to-wit:

"Thereupon the court, of its own motion, enters the following order: This cause having come on to be heard, a jury having been called and impanelled, counsel for both plaintiff and defendants having made their opening statements to the jury, and it appearing to the court from the statements of counsel made in opening their case, that the issues herein involved the settling of accounts between plaintiff and defendants which are in the nature of partnership accounts, and involve book accounts and the examination of many vouchers and papers and the casting of accounts, it is ordered by the court, of its own motion, that the jury be and the same is discharged, and that the form of action is changed to that of account; and the defendants, by their attorney, in open court, making no objection to this proceeding, and stating that they are willing to account to the plaintiff, and ask that the plaintiff should also account to them, it is ordered that the defendants do account with the plaintiff, and further ordered that the plaintiff do account with the defendants, and further ordered that George M. Stevens be and he is hereby appointed auditor in this case, under the law, who shall proceed with all due speed to appoint a time of hearing, and proceed with the hearing of this case according to law, and take an account between the parties, plaintiff and defendants, and take the evidence and report the same to this court, together with his conclusions thereon, finding in particular:—First, what were

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the net profits of the business carried on under the name of 'The New York Store,' at 284 and 286 West Madison street, from about February 1, 1875, to about November 1, 1880; second, what interest, if any, the plaintiff has in said net profits; third, when did the plaintiff's interest in the net profits begin and when did it end; fourth, what amount, if any, the defendants are now owing the plaintiff on account of such net profits; fifth, what amount, if any, the plaintiff is owing the defendants on account of said business;—to all of which the plaintiff, by his counsel, enters his exceptions herein."

Under this order both parties appeared before Stevens, as auditor, and introduced evidence. The auditor filed his report on May 10, 1889, finding that the net profits of the New York store from February 1, 1875, to October 11, 1880, were \$77,005.55; that plaintiff's interest in said net profits was one fourth; that said interest began on February 1, 1875, and ended on October 11, 1880; that defendants were owing the plaintiff on account of said net profits \$10,729.14; that plaintiff was owing the defendants, on account of said business, for taxes, insurance, carpets, etc., and cash advanced, \$1460.66; that the total amount due from defendants to plaintiff was the sum of \$9268.48. Exceptions were filed to this report by the defendants, but the court overruled the exceptions and entered judgment against the defendants for \$9268.48. This judgment has been affirmed by the Appellate Court and is brought thence by appeal to this Court.

The course pursued by the lower court, as set forth in the foregoing order, was arbitrary in the extreme. Against the protest of the plaintiff, his form of action was changed from assumpsit to account, but no change was made in the character of the pleadings. Under a declaration and pleas appropriate to the action of assumpsit, proceedings were taken which were only proper in an action of account. But the appellee here, plaintiff below, is not complaining of the change thus made, nor of the failure to make the pleadings conform to the

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change; and as to the appellants, the defendants below, they assented to the course pursued by the court, and made no objection to the appointment of an auditor, or to the taking of an account. They are estopped here from complaining of what they agreed to in the court below. In the action of account, a preliminary or interlocutory judgment *quod computet* is always entered before the final judgment upon the findings of the auditor. This interlocutory judgment merely determines that the defendant is liable to account, but determines nothing as to what may be due after an account taken. If the defendant denies his liability to account, the issue may be tried before a jury. In the present case, the defendants admitted their liability to account, and expressed their willingness to submit to an accounting. Accordingly, the entry of a judgment *quod computet* followed as a matter of course, and the order entered by the court as above recited may be regarded as such a judgment.

It is objected that the auditor was not sworn. The fact that he was not sworn is abundantly established by the proofs and is admitted by both parties. The failure to take the oath was set up in one of the exceptions filed by the defendants to the report of the auditor, but the exception was overruled. The seventh section of the "Act in regard to the action of account" (chap. 2 of Rev. Stat.) is as follows: "Whenever a judgment shall be rendered against any defendant, that he account, the court shall appoint one or more able, disinterested and judicious men as auditors, to hear, examine and adjust the accounts between the parties, *who shall, before they enter on their duties, be sworn* faithfully and impartially to take and state the account between the parties and make report to the court."

The question arising upon this branch of the case is: whether the oath of the auditor, as prescribed by the statute, is a prerequisite to jurisdiction, or whether there may be a waiver of such oath by the parties.

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Assuming for the present that the taking of the oath is a matter which may be waived, let us see whether there are any facts which amount to a waiver. Both parties introduced evidence before the auditor, and neither made the objection before him that he was not sworn. After he had filed his report, then for the first time he was asked by one of the counsel for the defendants whether the oath had been administered to him. Mr. Stevens was one of the masters in chancery of the Superior court. The first testimony taken before him was that of a witness on behalf of the defendants named Hartman, who was about to leave the State for California. Stevens testifies: "The first I knew about the case from the attorneys was on February 15. Mr. Hynes representing Ryan, and Mr. Brandt, representing Pardridge, came in there and told me the case had been referred to me. * * * Mr. Brandt asked me if I had a copy of the order. I told him, no. He asked me if I needed one. I said I would unless the attorneys agreed upon what it contained. Mr. Brandt then said, 'You are a master in chancery of this court, are you?' I said, yes. He then said to Mr. Hynes: 'let us waive all formality; I want to get through with this witness.' Mr. Hynes said he was willing to waive all formality, except the right of the court to refer the case." Hynes testifies: "When we got before Stevens I entered the objection that is of record, and Mr. Brandt said: 'let us go on; you can save all your points now.' We waived all formalities. * * * The matter of ceremony before the auditor was waived. There was not a word said about Mr. Stevens having taken an oath or not." Brandt says: "When I went before Stevens to take Hartman's testimony, the sole question I had in my mind and about which I was talking, was taking Hartman's deposition for the defense before the plaintiff put in any evidence. * * * My conversation referred to that only; not a word was said about Stevens not being sworn, and I did not know it till May 13, 1889."

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The fact that Stevens was master in chancery, an officer whose duties pertain to the equity side of the court, would not have relieved him, if the objection had been made, of the necessity of taking the oath when acting as auditor under an appointment made by a judge sitting on the law side of the court. But as master, he had the power to administer oaths, to take testimony and, when specially ordered, to report his conclusions therefrom; and he may well have inferred from the statements made to him by the attorneys, that he was to proceed with the taking of the rest of the testimony in the same way in which he had taken the evidence of Hartman, and that the ceremony of taking the oath as auditor was intended to be dispensed with. The attorney of the plaintiff also had good reason to believe from the language of the attorney for the defendants, that the latter had no intention of insisting upon the taking of the oath by the auditor. We, therefore, think that, if the oath could be waived at all, the facts, as above detailed, were sufficient to constitute such waiver.

Upon the question whether the taking of the oath is a jurisdictional prerequisite to the power of an auditor to proceed with his duties in an action of account, we have been referred to no authorities either in this State or elsewhere. But we see no reason why the rule upon this subject, which has been held to be applicable to arbitrators and other referees, may not also apply to auditors. The statute of this State on Arbitrations and Awards (sec. 3, chap. 10, Rev. Stat.) provides, that, "before proceeding to hear any testimony in the cause, the arbitrators shall be sworn faithfully to hear, examine and determine the cause, according to the principles of equity and justice, and to make a true and just award according to the best of their understanding." This court has never directly decided that the oath thus required to be administered to arbitrators may be waived, but the question has arisen under similar statutes in other States, and the decisions are not uniform.

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In some States, as in New Jersey, Kentucky and Louisiana, it has been held that the award is void, if the arbitrators are not sworn, where the statute directs them to be sworn. (*Insee v. Flagg*, 2 Dutcher, 368; *Fisher v. Mosley*, 1 Littell, 247; *Lile v. Barnett*, 2 Bibb. 166; *Overton v. Alpha*, 13 La. Ann. 558.) In other States, as in New York, Missouri, Wisconsin, Vermont and Pennsylvania, it has been held that the requirement of the statute may be waived. (*Howard v. Sexton*, 1 Denio, 440; *Hill v. Taylor*, 15 Wis. 190; *Cochran v. Bartle*, 91 Mo. 636; *Woodro v. O'Connor*, 28 Vt. 776; *Otis v. Northrup*, 2 Miles, 350; *Browning v. Wheeler*, 24 Wend. 258; *Day v. Hammond*, 57 N. Y. 479.) In *Newcomb v. Wood*, 97 U. S. 581, it was said by the Supreme Court of the United States: "The objection that the arbitrators were not sworn is waived by the plaintiff in error by appearing and going to trial without requiring an oath to be administered. If the witnesses had not been sworn, the waiver of that defect under the same circumstances would have been equally conclusive." (See also *Menard v. Freder*, 7 Cush. 250.)

The weight of authority is in favor of the position that the oath may be waived. A party ought not to be permitted to introduce testimony and to suffer his adversary to introduce testimony before an auditor, and then, when the findings turn out to be adverse to him, to make the objection for the first time that the auditor was not sworn. Thus to lie by, and take the chances of a favorable result, is inequitable. In such cases, silence ought to be regarded as acquiescence. If the objection that the oath has not been administered is made in apt time, it may be cured, and time and expense may be saved. It is not sufficient for the defendants to say that they did not know of the failure to take the oath until after the report was filed. They knew, or were bound to know, what the law was. The law required the auditor to be sworn before he entered upon his duties. If they intended to insist upon a compliance with this requirement, they should have made known their in-

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tention before the duties were entered upon. The appointment of the court is the source of the auditor's jurisdiction, and his failure to be sworn may be waived by the parties, as it was waived in the case at bar.

It is further objected that the auditor received and acted upon incompetent testimony. It was agreed between the parties that all objections should be taken down and reserved for the determination of the court thereafter, and that such objections should not be passed upon by the auditor. One of the questions was whether the plaintiff's interest in the profits began in February, 1875, or in August, 1878, the plaintiff contending for the former date and the defendants for the latter. The plaintiff introduced a witness named Levy, who was asked the following question: "Did you learn of, or hear during the time you were there anything said upon the subject of Mr. Ryan's having an interest in the profits of Pardridge's store?" to which he replied: "It was so generally understood; we always supposed that was the case." Both the question and answer were objected to. This evidence was manifestly incompetent, and was so admitted to be by the court in passing upon the exceptions to the auditor's report. But we do not think that the court erred in refusing to set aside the report on account of the admission of this testimony, for the reason that the finding of the auditor as to the date when the plaintiff's interest began was sustained by the other evidence upon that subject. If the objectionable question and answer had been ruled out altogether, the clear weight of the remaining proof was in favor of the date fixed by the report.

By the stipulation of the parties each objection was not separately submitted to the court, as it arose in the progress of the accounting. As the court could see, upon a consideration of the whole report and all the evidence accompanying it, that the objectionable evidence could not have affected the result upon the particular point at issue, it was not necessary to recommit the matter to the auditor by reason of the state-

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ment made by the witness Levy. It is true that, in an action of account, "the court may not have the power to remodel or change the report so as to alter the result, any more than it would have to alter the verdict of a jury." (*Lee v. Abrams*, 12 Ill. 111.) But the statute gives the court the power, in the exercise of a sound discretion, to approve or disapprove of the auditor's report. The whole proceeding, both before the auditor and before the court after the coming in of the report, should be governed by the principles, which apply to trials before the court without a jury, rather than by the technical rules, which are more strictly applicable in the case of jury trials. In *Schroeder v. Harvey*, 75 Ill. 638, we said: "The admissibility of some testimony of questionable competency, which was received by the court below, has been discussed in argument. * * * But we do not deem it necessary to consider this, as there was enough other testimony of unquestioned competency sufficient, in our opinion, to sustain the finding of the court; and where that is the case, and the trial before the court alone, the finding should stand, notwithstanding the reception of other incompetent evidence."

The same observations here made in regard to the testimony of Levy are applicable to some of the other evidence in the case, as to which there was merely a general exception to the effect that the auditor "heard and was informed by much other incompetent and illegal evidence."

The auditor gave the defendants credit for such amounts paid out for insurance and taxes as were proven by proper and legitimate testimony.

There are various other items in the account, about which the parties contradict each other, and as to which there is much conflicting testimony, such as rent, the weekly wages agreed to be paid Ryan in addition to his interest in the profits of the business, damages paid to a party injured in front of the store, the removal of goods to the amount of about \$17,500.00 by one of the defendants from the New York store to the main

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store without giving the New York store credit therefor, etc. These are purely questions of fact, and it would serve no good purpose to comment upon the evidence taken by both parties as to the various items thus in dispute. It is sufficient to say, that we have examined the testimony with care, and see no reason for disturbing the conclusions of the auditor as approved by the court below.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

CHARLES S. BURCH, Receiver,

v.

JAMES J. WEST *et al.*

Filed at Ottawa October 31, 1890.

1. **INSOLVENT DEBTORS**—*what will constitute a general assignment—and whether the particular transaction is in fraud of the statute.* In considering a transaction between a debtor and a portion of his creditors, it was said, to hold that an insolvent debtor, who, at the demand of importunate creditors, gives judgment notes for less than one-third of what his property will sell for in cash and at forced sale, thereby makes a voluntary assignment of all his property for the benefit of his creditors, notwithstanding the fact he expects and intends to keep on with his business, and gives such notes upon the supposition it will the better enable him to proceed therewith, would be giving an interpretation to the statute not warranted by its language. So such a transaction is not to be regarded as a fraud upon the statute.

2. **CORPORATE OFFICERS**—*power to give judgment notes.* Power in the president and secretary of a private corporation to give judgment notes to its creditors may be shown by facts and circumstances, such as the frequent giving of such notes, and the subsequent ratification by the board of directors.

3. **CHANCERY**—*equitable relief against judgment at law—upon what grounds.* Where judgments by confession are based upon full and adequate consideration, and there is nothing to impeach their justice, a court of equity will not grant relief against them on the ground of want of authority to execute the power of attorney under which the

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141	530
40a	448
40a	508
40a	515
40a	541
134	258
159	621
154	58
134	258
159	309
51a	590
134	258
156	630
134	258
53a	367
134	258
175	92
176	226
134	258
80a	461
80a	463
134	258
98a	602
134	258
98a	529

Brief for the Appellant.

confession was made. The remedy for such a defect is by motion in the court in which the judgment is entered.

4. A court of equity has no jurisdiction to enjoin a judgment entered in a court of law, merely because the process of that court was not served on the defendant. Equity will only interfere where it is further shown that the judgment is inequitable and unjust.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. O. H. HORTON, Judge, presiding.

Mr. MATTHEW P. BRADY, for the appellant:

Section 13 of the act concerning voluntary assignments prohibits all preferences between creditors. *Freund v. Haegerman*, 26 Fed. Rep. 812; *Preston v. Spaulding*, 120 Ill. 208; *Bank v. Rehm*, 126 id. 461.

After a corporation has become insolvent, its directors are under a positive obligation, as *quasi* trustees, to manage the assets with strict regard to the equitable rights of creditors. 2 Morawetz on Corp. sec. 795; *Bank v. St. John*, 25 Ala. 566; *Freeman v. Stine*, 15 Phil. 37; *Irons v. Bank*, 6 Biss. 301; *Atkins v. Saxtus*, 77 N. Y. 202; Boone on Corp. sec. 139.

As to the power of the president of a private corporation, see *Stokes v. Pottery Co.* 6 Am. and Eng. Corp. Cases, 240; Taylor on Corp. sec. 236; *Hoyt v. Thompson*, 5 N. Y. 320; *Morgan County v. Thomas*, 76 Ill. 120; Rev. Stat. chap. 32, sec. 6.

Directors can not, without express authority or by necessary implication, delegate to others any portion of their power requiring the exercise of discretion or judgment, or which it is intended they shall exercise personally. Boone on Corp. sec. 141, and cases in notes 8-11; *Flagstaff M. Co. v. Patrick*, 2 Utah, 304; *Davis v. Flagstaff M. Co.* id. 74; *Hyde v. Joyes*, 2 Am. Corp. Cases, 353; Green's Brice's Ultra Vires, 491, 492; *Gillis v. Bailey*, 21 N. H. 149; *Insurance Co. v. Chase*, 56 id. 341; *In re Leed's Banking Co.* L. R. 1 Ch. App. 563; *Bank Comrs. v. Bank of Buffalo*, 6 Paige, 497; *Percy v. Mil-*

Brief for the Appellees.

lardon, 3 La. 468; *Glidden v. Hopkins*, 47 Ill. 525; *Silver Hook Road v. Greene*, 00 R. I. 187.

Messrs. WEIGLEY, BULKLEY & GRAY, for the appellees

A corporation may give preferences to its creditors to the same extent that an individual may, there being no positive law to the contrary, even if by so doing it exhausts the whole of its available assets. 2 Morawetz on Corp. sec. 802; *Reichwald v. Hotel Co.* 106 Ill. 439; *Stratton v. Allen*, 16 N. J. Eq. 229; *Buel v. Buckingham*, 16 Iowa, 284; *Smith v. Lansing*, 22 N. Y. 521.

A corporation has power to give judgment notes. *Millard v. Female Academy*, 8 Bradw. 341; *White v. Crow*, 17 Fed. Rep. 98.

A warrant of attorney to confess judgment is a familiar common law security, and the entry of judgment by *cognovit* thereunder is a proceeding according to the course of the common law, which courts have ever entertained in the ordinary exercise of their authority as courts of general jurisdiction. *Bush v. Hanson*, 70 Ill. 480; *Chamberlain v. Mining Co.* 20 Mo. 97; *Miller Bros. v. Bank*, 2 Ore. 291.

The same presumptions obtain in favor of a judgment entered by confession upon warrant of attorney, as to the authority and jurisdiction of the court to enter the same, as in the case of other ordinary judgments of superior courts of general jurisdiction. *Bush v. Hanson*, 70 Ill. 480; *Osgood v. Blackmore*, 59 id. 261.

A judgment may be confessed on a note before it is due, if the warrant of attorney attached thereto authorizes it. *Adam v. Arnold*, 86 Ill. 185; *Sherman v. Baddely*, 11 id. 622; *Towle v. Gonter*, 5 Bradw. 409; *Cummins v. Holmes*, 11 id. 158.

The fact that a judgment is confessed for too much does not render the same void. The defendant may have the error corrected, but a stranger has no right to interfere. *Adam v. Arnold*, 86 Ill. 185.

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The authority of officers of a corporation to bind it may be presumed from custom. *Mitchell v. Deeds*, 49 Ill. 417; *Smith v. Smith*, 62 id. 493; *Building Society v. Crowell*, 65 id. 453; *Sawyer v. Cox*, 63 id. 134.

Under the statute, (Rev. Stat. chap. 69, sec. 7,) only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, and so much as shall be sufficient to cover costs. *Sprague v. Lux*, 12 Bradw. 271.

The board of directors of a corporation may subsequently ratify, adopt or approve any acts of its officers, agents, or even strangers, which it could have originally authorized, and if it does so, it is equivalent to a prior authorization. *Wood v. Wheelen*, 93 Ill. 164; *Reichwald v. Hotel Co.* 106 id. 440; *Thomas v. Mueller*, id. 36; *Town of Bruce v. Dickey*, 116 id. 533; *Connett v. City of Chicago*, 114 id. 239.

The board of directors are vested by law with all corporate powers in respect to the management of the corporation, and hence need not be empowered by the stockholders before authorizing the giving of judgment notes. Rev. Stat. chap. 32, sec. 6; *Wood v. Wheelen*, 93 Ill. 153.

MESSRS. FRANK J. SMITH & HELMER, also for the appellees.

MR. J. A. SLEEPER, for the appellee the Union Trust Co.

MR. JUSTICE BAKER delivered the opinion of the Court :

On the 27th day of October, 1887, James J. West, one of the appellees herein, understanding himself to be under obligations to protect the interests of the Union Trust Company, the Kalamazoo Paper Company, the Chicago Paper Company and the Western Publishing House, in respect to the matter of their claims against the J. L. Regan Printing Company, a corporation organized under the laws of the State of Illinois, called upon the president and secretary of said printing com-

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pany, and induced them to execute and deliver to him three judgment notes of said corporation, each authorizing the entry of judgment thereon at any time, either before or after the maturity thereof. Two of said notes were made payable to the Union Trust Company, and one of them was for \$5440.06, and the other for \$4881.45, and the third note was for \$9375.98, and was made payable to West himself, and was intended to cover the claim of the Chicago Paper Company for \$3212.46, the claim of the Kalamazoo Paper Company for \$2000, and the claim of the Western Publishing House for \$4163.52. The aggregate of the three notes executed at that date was \$19,697.49. At and prior to that time said West held and owned six similar judgment notes given by the J. L. Regan Printing Company, and the aggregate amount of principal, and interest thereon to that date, was \$35,344.74; and the Union Trust Company also held two other judgment notes of the printing company, and the principal and interest thereof to that date was \$5400.

Shortly after the procurement of the three first mentioned judgment notes, and on the same day, judgments were rendered, by confession, on all the above mentioned judgment notes, in the Superior Court of Cook county, against the said J. L. Regan Printing Company. The aggregate of the judgments in favor of West, in his own right, was the aforesaid sum of \$35,344.74, the aggregate of the judgments in favor of the Union Trust Company was \$15,721.51, and the judgment in the name of West, but for the benefit of the two paper companies and the publishing house, was \$9375.98, making \$60,442.23 in all. On the same 27th day of October, 1887, executions were sued out on said judgments, placed in the hands of the sheriff of Cook county, and levied upon all the assets and property of the J. L. Regan Printing Company, except the book accounts and choses in action. On the same day, but after the levy aforesaid, the J. W. Butler Paper Company sued out of the said Superior Court a writ of attachment

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for the sum of \$1426.33, which was also levied upon the said property. On the next day, October 28, 1887, two judgments were rendered in the same court, upon judgment notes, by confession, in favor of Carleton Prouty, and against the printing company, one for \$1548.04, and the other for \$2308.51, and executions were immediately issued thereon, and levied on the same property.

On November 7, 1887, the circuit court of Cook county, in a suit in equity brought by certain creditors of the J. L. Regan Printing Company, on behalf of themselves and all other creditors, entered a decree dissolving the corporation, and on November 10, following, Charles S. Burch, the now appellant, was appointed receiver of the assets of said printing company. A few days thereafter the receiver filed in said circuit court this bill, for the purpose of enjoining a sale of the assets of the J. L. Regan Printing Company by the sheriff, under the aforesaid executions, and praying that each of said executions be quashed, and that the judgments on which they had issued be set aside. The grounds upon which it was claimed in the bill that the relief therein sought should be granted, are thus summarized in the brief and argument of appellant:

"Because the officers who executed the notes and warrants of attorney had no authority to execute the same; that the power to confess judgment against the corporation at any time after the giving of the notes, and before the maturity of the same, was unusual and extraordinary, and could not be conferred by the officers, who were only authorized to transact the ordinary business of the company; that when the several judgment notes obtained by West were given, the company was, to his knowledge, insolvent, being largely indebted to a great number of persons and corporations, whose just claims it was unable to pay; that the judgment notes were obtained by West with intent to immediately enter up judgments upon the same before the maturity thereof, ruin the business of the company, acquire the ownership of its assets when forced on

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the market by the sheriff, at a sum much less than their value, and fraudulently prevent the company's *bona fide* creditors from enforcing or collecting their just demands; that all the property of the company was seized by the sheriff under the executions issued upon the said judgments, and in consequence its general creditors have been prevented from collecting their demands; that the board of directors had no authority to empower the president and secretary, or either of them, by any resolution, to bind the corporation by such a warrant of attorney; and that the judgment notes were not based on a good or sufficient consideration."

On November 16, 1887, an order was entered that the sheriff, upon the receipt by him of a bond for \$65,000, turn over to the receiver all the property of the corporation in his possession, and that all liens and rights of all parties upon the said property should be preserved until the further order of the court.

Answers were filed by the several defendants, to the bill of complaint, and replications to such answers.

Upon the hearing, the circuit court decreed in favor of the validity of the claims and judgments of the several judgment creditors, and that their execution liens, and the lien of the attaching creditor, the J. W. Butler Paper Company, were prior and superior to the rights of the receiver, and should be first paid out of the assets surrendered by the sheriff. The court, however, first reduced the judgment for \$9375.98, wherein West was trustee for the Western Publishing House and two other corporations, in the sum of \$3463.52, for work done for said publishing house during the month of October, 1887, and for which no bill had been rendered at the time of the entry of said judgment; and also reduced the Carleton Prouty judgments very considerably, on account of payments received on collaterals held, attorney's fees improperly included in the judgments, etc. The court found, by its decree, that the prior liens amounted to \$61,233.96, and that the receiver had received from the proceeds of the property surrendered by the

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sheriff, more than the sum of \$61,233.96,—the amount of said liens. Upon appeal to the Appellate Court for the First District the decree was affirmed, and the cause was then brought here by this further appeal.

It was urged in the Appellate Court, apparently for the first time, that the judgment in favor of West for \$9375.98, and the judgments in favor of the trust company for \$5440.06 and \$4881.45, respectively, were preferences in fraud of the act concerning voluntary assignments, and therefore void. Neither the facts alleged in the bill nor the facts established at the hearing show either that there was a voluntary assignment or a case within section 13 of the Voluntary Assignment act. In *Hide and Leather Nat. Bank v. Rehm*, 126 Ill. 461, the debtor, at the time he gave the judgment notes, intended making a general assignment, and actually made such assignment the next morning; and it was held, that as the judgments were confessed for the purpose of preferring the plaintiffs therein, they were void, and that the holders of the judgments acquired no lien in preference of the general creditors. But in *Hanford Oil Co. v. First Nat. Bank*, 126 Ill. 584, it was expressly said: "Notwithstanding the Voluntary Assignment act, a debtor, though insolvent, may still secure, by mortgage or confession of judgment, or otherwise, a *bona fide* indebtedness, if done in good faith, and not in contemplation of making an assignment under said act." In the case at bar, the corporation was undoubtedly insolvent, and this was probably known to both West and to the officers and directors of the company; but, then, it is equally clear that said officers and directors did not contemplate that the corporation would make a voluntary assignment of its property, and that no such assignment was in fact made. On the contrary, it is manifest that those in charge of the corporate affairs were using every endeavor to tide over the indebtedness of the corporation, with a view of an improvement of its affairs, and that the execution of the three notes in question, upon demand made by one of its

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largest creditors, was supposed by them to be in furtherance of that object; and it affirmatively appears from the evidence of the witnesses introduced by appellant, that had the officers known that it was intended to enter up judgments on the notes, such notes would not have been given.

Without here determining what is a voluntary assignment, within the purview of the Voluntary Assignment act, it is very evident that there was not in this case such an assignment. The property upon which the executions were levied realized at forced sale some amount in excess of \$61,233.96, but how much in excess does not appear in this record; nor does it appear therefrom what was the amount or value of the book accounts and choses in action possessed by the corporation. As we have before seen, the aggregate of the judgment notes executed on the 27th day of October, and the execution of which seems to be claimed was in effect a voluntary assignment, within the act, was only \$19,697.49. To hold that an insolvent debtor, who, at the demand of importunate creditors, gives judgment notes for less than one-third of what his property will sell for in cash and at forced sale, thereby makes a voluntary assignment of all his property for the benefit of his creditors, notwithstanding the fact he expects and intends to keep on with his business, and gives such notes upon the supposition it will the better enable him to proceed therewith, would be giving an interpretation to the statute that is wholly unwarranted by its language. We think there is no merit in the claim made by appellant, that the execution of the three notes made on October 27, 1887, was a voluntary assignment, or in fraud of the Assignment act.

It is claimed in respect to all of the judgments entered by confession against the J. L. Regan Printing Company, that they are invalid, because rendered upon warrants of attorney executed by officers of the corporation without authority. Owing to differences in the circumstances attendant upon the large number of warrants of attorney involved, quite a variety

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of questions arise upon this branch of the case. In view of the corporate powers vested in the company by the general law under which it was organized; in view of the fact the act provided that the corporate powers should be exercised by the board of directors; in view of provisions contained in the by-laws of the company; in view of resolutions adopted by the board of directors approving the action of the president and secretary of the company in executing notes with warrants of attorney, and authorizing them to execute judgment notes; in view of the fact that the president and secretary of the company, during the whole term of its corporate existence, executed, in behalf of the company, judgment notes similar to those at issue in this case, and that this was known to the directors, and they made no objection thereto; and in view of the fact, shown by the evidence, that it is, and for many years has been, the general, well established and practically universal custom of banks and bankers in the city of Chicago to take notes from their customers for money loaned them, containing powers of attorney to confess judgments, similar to those found in this record, we are inclined to think that authority to execute all of the warrants of attorney here in question sufficiently appears. But be this as it may, and even if we assume that the officers of the company were not authorized to execute the powers of attorney, yet appellant can not now avail himself of the objection.

All of the judgments were based upon full, adequate and valuable considerations, and nothing appears in the record to charge any of the judgment creditors with fraud, or to show that any of the judgments were collusively confessed when no indebtedness, or no sufficient indebtedness, existed. Nothing appears in the record to impeach the justice of the judgments. The statute (Rev. Stat. 1874, chap. 69, sec. 7,) provides, that only so much of any judgment at law shall be enjoined as the complainant shall show himself equitably not bound to pay, etc. At most, the defects in the judgments were the want of a

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service of process. The remedy for such defects was in the law court which rendered the judgments, or by writ of error. A court of equity has no jurisdiction to enjoin a judgment entered in a law court, merely because the process of that court was not served on the defendant, and will only interfere when it is further shown that the judgment is inequitable and unjust. (*Stokes v. Knan*, 11 Wis. 391; *Blackburn v. Bell*, 91 Ill. 434; *Thomas v. Mueller*, 106 id. 36; *Colson v. Leitch*, 110 id. 504.) In this case, there being no injustice and no fraud in the judgments, neither the printing company, nor its creditors, nor the receiver, have any right to relief in a court of equity.

Some minor objections are urged to the decree, but they do not seem to require special mention. Suffice it to say, that we think the assignments of error in respect thereto are not well assigned.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

HERBERT REYNOLDS *et al.*

v.

MILK GROVE SPECIAL DRAINAGE DISTRICT *et al.*

Filed at Ottawa October 31, 1890.

1. DRAINAGE LAW—*change in the plan or system—of a second assessment—notice of such change.* It is the duty of the commissioners of drainage districts first to adopt a plan or system of drainage which will protect all the lands in their district, and then to classify the lands to be benefited thereby. If, at any time before the completion of the work, the plans are found to be deficient to accomplish the purpose intended, the commissioners are empowered, by implication, to change the same, and may levy an additional assessment to make the necessary changes.

2. No notice is necessary of the change of the plans in a drainage district, or of a levy of a second assessment occasioned thereby, when such change becomes necessary to protect all of the lands assessed.

Brief for the Appellants.

3. **CHANCERY**—*irregularities in assessment—under the Drainage law.* Where the officers of a drainage district are authorized by law to make a particular assessment, and there is no fraud, mere irregularities in the proceedings under which the assessment is made will not give a court of chancery jurisdiction to restrain its collection.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Illinois county; the Hon. ALFRED SAMPLE, Judge, presiding.

Mr. C. H. PAYSON, for the appellants:

When the statute prescribes a mode and purpose of taxation that mode must be pursued, and no other mode or purpose can be substituted. Dillon on Mun. Corp. (1st ed.) sec. 610; *Howe v. People*, 86 Ill. 288; *Gaddis v. Richland County*, 92 id. 119; *Webster v. People*, 98 id. 349.

The power to levy a tax must be plainly and unmistakably conferred. Cooley's Const. Lim. (1st ed.) 518; Dillon on Mun. Corp. (1st ed.) secs. 605, 606; *Webster v. People*, 98 Ill. 343.

When an assessment is made by officers, they must, like inferior courts, show their power in every case. If this be wanting, their proceedings must be held void whenever they come in question. *Sherlock v. Village of Winnetka*, 68 Ill. 540; *People v. Village of Crotty*, 93 id. 180; *Cook County v. McCrea*, id. 236.

It is a fundamental principle, that before a person can be deprived of a right, even by judicial sentence, he must have notice, and reasonable opportunity to be heard in defense of his rights. *Gilmore v. Sapp*, 100 Ill. 297; *Updike v. Wright*, 81 id. 49.

A special assessment must be in proportion to the benefits to be derived from the proposed work. (*Chicago v. Larned*, 34 Ill. 203; *Ottawa v. Spencer*, 40 id. 215; *Bedard v. Hall*, 44 id. 91.) And it must appear, from the proceedings themselves, that such was the principle upon which the assessment was made. *Crawford v. People*, 82 Ill. 559.

Brief for the Appellees.

The burden must be distributed according to the carefully ascertained proportion in which each part will be beneficially affected. (*Craw v. City of Tolono*, 96 Ill. 262.) And when this is not done a special assessment is void. *Bibel v. Bloomington*, 67 Ill. 172.

When the law has conferred no power to levy a tax, or when the proper persons shall make a levy for purposes on the face of the levy not authorized, a court of equity will stay its collection. *Ottawa v. Walker*, 21 Ill. 605; *Railroad Co. v. Frary*, 22 id. 34; *Lippincott v. Town of Pana*, 92 id. 24; *Sherlock v. Village of Winnetka*, 68 id. 540.

This may occur (illegality of tax) when there is no law on the subject authorizing it. *Keigwin v. Drainage Comrs.* 115 Ill. 347.

Messrs. KAY & EVANS, for the appellees:

This court will not inquire into irregularities not affecting the substantial justice of the tax. *Buck v. People*, 78 Ill. 560; *Thatcher v. People*, 79 id. 597; *Chiniquy v. People*, 78 id. 570; *Fisher v. People*, 84 id. 490.

The objections to assessments are waived if not made before the commissioners. *Moore v. People*, 106 Ill. 376; *Blake v. People*, 109 id. 504; *Morrell v. Drainage District*, 118 id. 139.

The legislature is the sole judge of the mode in which the power is to be exercised. *Kilgour v. Drainage Comrs.* 111 Ill. 342.

The provisions of the constitution in relation to taxes have no application to the imposition of the burdens imposed by the Drainage act. These assessments are not taxes. *Kilgour v. Drainage Comrs.* 111 Ill. 344.

Under the Drainage law the land owner has a clear right to contest, on appeal, the reasonableness of assessments against each one of his tracts assessed for benefits. *Turley v. People*, 116 Ill. 433.

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All land owners in an organized district have, under the law, given their assent,—a part of them by signing the petition, the others by the privilege they have to contest by appeal. *Owners of Lands v. People*, 113 Ill. 296.

The organization can not be attacked collaterally,—for such purpose the proper remedy is *quo warranto*. *Blake v. People*, 109 Ill. 504.

All objections which might have been made on appeal are waived. They can not be urged in any other manner. *Blake v. People*, 109 Ill. 504.

It is a question of jurisdiction. If errors not jurisdictional were committed, the remedy is by appeal. *Keigwin v. Drainage Comrs.* 115 Ill. 347; *Moore v. People*, 106 id. 376.

The legality of the formation and organization can not be inquired into in chancery. *Evans v. Lewis*, 121 Ill. 478.

The curative act of 1885 must be liberally construed to promote drainage, and the reclaiming of wet and overflowed lands. *Lees v. Drainage Comrs.* 24 Ill. App. 487.

MR. JUSTICE WILKIN delivered the opinion of the Court:

This action originated by a bill in chancery by appellants, against appellees, in the circuit court of Iroquois county, to enjoin the collection of a special assessment and the payment of certain bonds. A writ having issued in vacation, appellees appeared at the March term, 1889, of said court, and moved to dissolve the injunction and dismiss the suit, on bill and answers. The motion was allowed, and a decree rendered accordingly. This is an appeal from a judgment of the Appellate Court for the Second District affirming that decree.

The Milk Grove Special Drainage District was organized February 26, 1885. On August 1, following, the commissioners, with the assistance of one Crowell, as civil engineer, located certain work to be done in the district, and estimated the cost thereof at \$14,000. That work consisted of a single

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drain, designated on the plat as "Main Line Ditch." On the 10th of the next December the lands of the district were classified, and on January 20, 1886, a levy made of \$14,047.50, to construct that drain. On the 9th of August, 1886, before the work on the main ditch was completed, the commissioners located eighteen lateral ditches, the estimated cost of which was \$20,000, and on October 11 of that year they made a second special assessment of \$20,407.50. This assessment was made upon the former classification, and for the purpose of raising funds to construct said lateral ditches. It is admitted that no notice of the location of these lateral drains was given by the commissioners, though it is averred in the answer that the complainants had actual knowledge of all the proceedings in relation thereto, and of work done thereon, long prior to the filing of their bill.

Appellants insist that the commissioners had no legal right to make the last named ditches, and therefore no power to make an assessment to pay for them. Hence they say, the second special assessment was levied without authority of law, and file this bill to enjoin its collection. If these officers were authorized by the statute to make the assessment, then mere irregularities in the proceedings under which it was made would not give a court of chancery jurisdiction to restrain its collection. (*Chicago, Burlington and Quincy Railroad Co. v. Frary et al.* 22 Ill. 34; *Merritt et al. v. Farris*, id. 303; *Keigwin et al. v. Drainage Comrs. of Hamilton Township et al.* 115 id. 347.) The element of fraud does not exist in this case.

Section 56 of the Drainage act of 1885 (3 Starr & Curtis, p. 224,) is as follows: "The commissioners, as soon as they are elected or appointed and qualified, shall go upon the land included in said drainage district, and determine upon a system of drainage, which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies as well as the present. A competent engineer shall be employed to locate and advise upon the character of

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the work to be done, and report in writing, with maps, profiles and estimates of cost, and, in a general way, the benefit to accrue to the lands in the several localities of the district. They shall make, or cause to be made, a map or plat of the district, and of the work to be done therein, which map shall show, with reasonable certainty, the location of the proposed work, and they shall give a name or number to each ditch or drain. The maps and papers showing the final determination as to the system of drainage shall be filed in the clerk's office and be recorded in the drainage record."

Appellants maintain, when this duty has been performed the plans for the drainage of the district thereby become fixed, and the commissioners can not change them until all the work embraced in the system first adopted has been completed. Conceding that no section of the statute expressly confers the power upon drainage commissioners to change a system of drainage once adopted, we think that power clearly exists by implication. There is certainly nothing in the statute prohibiting such changes, and a moment's reflection will convince any one that the object of the organization of all drainage districts, viz., the drainage of the lands therein, would be greatly embarrassed, and often defeated, if those having the work in charge had not the power to correct mistakes made by themselves or their engineer in adopting a system. The first duty of the commissioners is to afford the district a system of drainage which will protect all the lands in it. If their first efforts to do so prove unavailing, the duty is not performed, neither is their power in that regard exhausted. Suppose an engineer makes a mistake in his survey of the work, and after his plans have been adopted and recorded the commissioners become convinced that the system adopted will not effectually drain the district,—will not accomplish the object for which the district was organized,—are they powerless to change it? Must the district be abandoned, or its money expended without benefit?

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Section 41 of the same act gives the commissioners power, even after the original plans have been carried out, to so change them that all lands in the district, so far as practicable, shall receive their proper and equal benefits, as contemplated when the lands were classified, and, if sufficient funds are not on hand for that purpose, to make a new levy. It could scarcely be seriously contended, that the commissioners of this district, after becoming convinced that the first system adopted would not accomplish the original purpose, were powerless to change it while the original work was unfinished, but could, after having expended the funds of the district (it may be uselessly) in finishing that work, lawfully locate additional drains. Such a construction would often lead to the expenditure of district funds in completing work of no practical value to the district.

It is earnestly contended, that to hold that the plans of work may be changed after being once adopted, is to clothe the commissioners with a dangerous power. As before stated, the object of such organizations is to afford drainage to the lands of the district. It is made the duty of its officers to adopt a system which will best accomplish that object, and their action in that regard is not subject to review, unless they act fraudulently. The system adopted by them, and the estimated cost of the work, are not matters to be submitted either to the county court or the people of the district, as is assumed in the argument on behalf of appellants. Therefore, whether their first plans are adhered to, or changed before the work is completed, or after it has been practically tested, their power is the same,—no more dangerous in the one case than in the other.

An argument against the view here expressed, as to the power of commissioners to change their original plans, is attempted to be drawn from section 21 of the Drainage law. That section requires the commissioners, as soon as the plans for the work have been determined upon, to proceed to make special assessments for benefits, by classifying the lands in

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the district according to the benefits to be received by the contemplated drainage, and it is provided by said section that such classification, when established, shall remain as a basis for such levy of taxes as may be needed for the lawful and proper purposes of the district. Subsequent sections provide for an appeal from such classification by any person interested. Assuming that the benefits to different tracts of land in the district could not be relatively the same after the change of plans as before, it is argued that appellants were deprived of the right to question the fairness of the classification upon which their lands were assessed by the second levy. The classification under section 21 is undoubtedly made on the plans then adopted, but it is also made upon the supposition that those plans, when completed, will effectually drain the lands of the district. When those plans fail to accomplish that purpose, and others are adopted which will, the commissioners do no more than make the system conform to the classification. Had the commissioners gone on and completed the original plan, and it had proved inadequate, under section 41 they might have put in these lateral ditches, if they were necessary to carry out the original purpose, "to the end that all lands, so far as practicable, should receive their proper and equal benefits, as contemplated when the lands were classified." The change here, as there, is made for the purpose of conferring the "benefits as contemplated when the lands were classified."

It is to be observed that there is no averment in this bill that the plans first adopted would have proved sufficient, or that the additional ditches are not necessary to complete the system of drainage for the district.

For the reasons stated, no notice of the change of plans or of the second levy was necessary. See, also, *The People ex rel. v. Chapman*, 127 Ill. 387.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

WILLIAM COFFIN *et al.*

v.

ALEXANDER P. ARGO *et al.**Filed at Springfield June 12, 1890.*

1. IMPEACHING DECREE—*by infants—upon what grounds.* A minor may maintain in this State a bill to impeach a decree against him, for fraud, or for error appearing upon the face of the record.

2. PARTITION—*sale—only after report of commissioners.* In a proceeding for the partition of land, whether in equity or under the statute, it is an essential prerequisite to a decree of sale that commissioners shall have been appointed, and they report that the land is not susceptible of partition. Section 16 of the Partition act is mandatory, and when partition is sought by either mode, a decree for a sale is erroneous, unless based upon a report of commissioners.

3. TRUST—*whether a trust arises—and in whose favor.* The owner of certain lands conveyed the same, in parcels, to his sons and sons-in-law, the latter giving their notes in return, for a purchase price, with interest. Only so much of the interest was to be paid as might be needed by the grantor, and the principal not to be collected at all, but the notes to be surrendered to the makers at his death. Subsequently one of the sons-in-law desired the title to the land conveyed to him to be vested in his wife, to which the grantor assented, and in furtherance thereof the grantee mentioned, and his wife, conveyed to a third person, who at once executed and acknowledged a deed to the wife, but it was questioned whether that deed had ever been delivered. The original grantor surrendered to this son-in-law the notes he had received from him. On bill filed by the other heirs of the first grantor, it was held, that the grantee of the son-in-law mentioned, and his wife, held the title in trust for the latter, and not for the heirs generally. It was not essential to the right of the *cestui que trust* that she should have given her notes in lieu of those which had been surrendered to her husband,—and especially was this true in view of the fact that the original grantor, for whose benefit, alone, the notes could have been required, had died before the bill was filed.

4. SAME—*bill to declare a trust—sale of the trust estate.* On bill to declare the trust upon which a defendant holds land, where no liens are set up or any equitable reasons shown for the sale of the land, it will be error to order its sale. In such case, the power of the court is spent when it declares the uses.

284	276
143	557
134	276
179	14

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WRIT OF ERROR to the Circuit Court of Piatt county; the Hon. C. B. SMITH, Judge, presiding.

Mr. FRANK PITTMAN, for the plaintiffs in error.

Mr. W. E. LODGE, and Mr. S. R. REED, for the defendants in error.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This was a bill in chancery, filed in the Piatt circuit court, by William, John and Solomon Coffin, minors, etc., by their next friend, against Alexander P. Argo and others, to impeach a decree rendered in said court in a proceeding in chancery, wherein the said Alexander P. Argo was complainant, and Solomon Argo and others, including these complainants, were defendants, and to vacate and set aside the sales of and deeds to real estate made by virtue of said decree, and to have the title to said land decreed to be in them. The bill of said minors was, on the hearing in the circuit court, dismissed, and they now bring the record to this court by writ of error.

The right of the minor complainants to maintain a bill to impeach the former decree for fraud, or for error appearing upon the face of the record, is clearly established in this State. *Loyd v. Malone*, 23 Ill. 43; *Kuchenbeiser v. Beckert*, 41 id. 172; *Hess v. Voss*, 52 id. 472; *Gooch v. Green*, 102 id. 507; *Lloyd v. Kirkwood*, 112 id. 329; *Haines v. Hewitt*, 129 id. 347.

Conceding all that is claimed by defendants in error, we are of opinion that the decree in this cause must be reversed. Taking everything alleged in the bill of Alexander P. Argo as true, the court, in that suit, erred in rendering a decree ordering the land sold. If said bill is to be treated as a bill to declare the trust upon which Solomon Argo held the land in controversy, only, then the power of the court was spent when it declared the uses. There were no liens set up, or any equitable reasons shown for sale of said land. If said Solomon

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held said land in trust for the heirs of John Argo, such heirs were tenants in common, in equity, in and to the land. When the court found and decreed that said Solomon so held the same in trust, it was its duty to declare the same, and vest the legal title in the true owners. If, however, that bill may also be treated as a bill for the partition of real estate held by the heirs of John Argo by equitable title, then there was a fatal error in ordering a sale of the land without first having ordered a partition and appointing commissioners to make the same. If it be true that the land belonged, in equity, to the heirs of John Argo, as tenants in common, the complainants in the present bill, as the owners of a one-fifth interest therein, had a right to have their portion of the land partitioned to them, if it could be done without manifest prejudice to the proprietors of the land. We held in *Rohn v. Harris*, 130 Ill. 525, that whether the proceeding for partition is by petition under the statute or by bill in chancery, an essential prerequisite to a decree authorizing a sale is the appointment of commissioners to make partition, and a report by them that the land is not susceptible of partition; that section 16 of the Partition act is mandatory, and that where partition is sought by either mode, a decree for sale is erroneous, unless based upon a report of commissioners. See, also, *LeMoyne et al. v. Quimby et al.* 70 Ill. 399.

But independently of this error, and going to the merits of the controversy, we are not prepared to hold, as was found and declared in the decree rendered in the former case, that Solomon Argo, under the deed from James B. Coffin and wife, held said land in trust for the heirs of John Argo, deceased. Without entering upon an extended discussion of the evidence, it may be said, that John Argo, apparently desiring that his sons and sons-in-law should have the use of portions of his land during his lifetime, and intending to reserve to himself an income, if it should be needed, at least out of the parts conveyed to the sons-in-law, conveyed lands to each of his two sons and

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three sons-in-law, taking from the latter notes for a purchase price. In respect to the notes taken from Coffin and Stolter the consideration was divided into five parts, and notes taken, payable in one, two, three, four and five years, with interest. The notes were made payable to John Argo, for the use of his sons and sons-in-law, one being payable for the use of each. The weight of proof is, that these notes were given with the agreement and understanding that the interest was to be paid if John Argo needed it, and that the principal of the several notes was never to be paid. It seems that Stolter's notes were surrendered to him, and that the notes of Kennedy, the other son-in-law, have not been paid. The tract of land conveyed to Solomon, one of the sons, was in consideration of one dollar, which he swears he paid, and it does not clearly appear what consideration was paid by the other son. All of these parties entered into possession under their deeds.

Two or three years after the making of said deeds and notes, James B. Coffin, for some reason not important here, desired that the land deeded to him should be conveyed to his wife, Nancy Coffin. Thereupon, and with the consent of John Argo, and for the purpose of putting the title into said Nancy, Coffin and wife made and delivered their deed to said land to said Solomon Argo. The last mentioned deed is the deed under which it is claimed that Solomon holds the land in trust for the heirs of John Argo. At the time of the making and delivering of that deed, Solomon Argo and wife executed and acknowledged a deed conveying the land to Nancy Coffin, and there is controversy in the evidence as to whether that deed was ever delivered. We do not find it important to determine whether it was or not, for, in any event, it must be held that said land was conveyed to Solomon in trust, to convey to said Nancy. This is not disputed, but it is said that such conveyance was to be made to her only upon the condition that she should execute like notes with those her husband had executed at the time the land was conveyed to him, and which notes had been

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surrendered by John Argo to her husband, and that since she either neglected or refused to execute the notes, she therefore never became entitled to the deed. If this position be true, it can not affect the title to the land. John Argo is dead, and was at the time of the filing of the several bills herein. There is no pretense that he ever made demand for any interest that he did not receive, and the principal of the notes was never to be paid, but the notes, at his death, as shown by a preponderance of the proof, were to be used merely as evidencing the amount that had been advanced, or, if not to be regarded as a technical advancement, to show the amount that the maker had received out of the estate. John Argo consented to the change of title from James B. Coffin to Nancy Coffin. She was to do no more than to give notes, which, under the arrangement, would be cancelled at his death. He voluntarily surrendered the notes of James B. Coffin. He never afterwards, so far as shown by this record, sought to make any change in the disposition of the land. When the bill was filed by Alexander P. Argo, Solomon Argo held the land in trust for Nancy Coffin or her children. This must be so even upon the assumption most favorable to defendants in error that can be drawn from the proofs,—that the land was to be conveyed to Nancy upon her execution of like notes, and having the like effect as the notes given by her husband. As the owner of the land had made no change in the use to which Solomon held it, and the time having arrived when the notes were to be regarded only as determining the amount she had received from her father, their execution would be a useless thing. There being nothing to be done by her, Solomon would become the mere holder of the naked legal title for her use.

The decree of the circuit court dismissing the bill in this case is reversed, and the cause is remanded, with directions to enter a decree cancelling the master's deeds to Solomon Argo and to Alexander P. Argo for parcels of said land, setting aside the master's sale, and vacating the decree rendered in the said

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cause of Alexander P. Argo against Solomon Argo and others, and for further decree not inconsistent with this opinion. The legal title to the land should be conveyed to plaintiffs in error, and if it be found that the trustee has expended any money for their benefit, in paying taxes or other liens upon the land, an account of the same should be taken, and his equitable rights in respect thereto protected.

Decree reversed.

J. S. WYLIE *et al.*

v.

JAMES G. ELWOOD.

Filed at Ottawa October 31, 1890.

1. NUISANCE—*what may constitute a nuisance—by reason of its locality.* A coal shed for the loading, unloading and storing of coal by the use of machinery, though not a nuisance *per se*, may be such from the particular locality in which it is situated, as, in a thickly populated part of a city.

2. SAME—*right of action—of a public and a private nuisance.* The general rule is, that public or common nuisances can only be proceeded against by indictment; but it is also a well established rule, that when a person sustains from a public nuisance a special damage different from that common to all, he may have his action therefor. The doctrine now is, that a nuisance may be at the same time both public and private.

3. An individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. So the use of a steam engine in a crowded street may be a public nuisance, but if the smoke from it injures a man's goods in his shop or house, and makes his dwelling uncomfortable, he will have a right of action.

4. If one is injured in the enjoyment of his residence in a populous part of a city, from the erection and operation of a large coal shed, by noises from the use of machinery, and the grinding of coal in being moved, loaded or unloaded, and from deposit of dust, etc., he may have his action against the author of the nuisance; and it is no defense to show that the same act inflicted a like injury upon many others.

184	281
67a	567
134	281
73a	626
134	281
78a	367
134	281
81a	429
134	281
83a	332
184	281
d105a	566
184	281
111a	*328
112a	*291

Brief for the Appellants.

5. *SAME—evidence—showing character and extent of injury.* In an action on the case, to recover damages from the operation of a coal shed, and the handling of coal by machinery propelled by steam, in a populous part of a city, many owners and occupants of buildings in the vicinity were admitted to testify that they also were annoyed and injured by the noises and coal dust, in the use of their property: *Held*, admissible to show the character and extent of the plaintiff's injury, and as tending to prove that the nuisance was capable of inflicting the injury complained of.

6. *RIGHT OF WAY—by grant—damages as to land not included in the grant.* In 1854 the owner of land conveyed a part of it to a railway company, for right of way: *Held*, that such deed could not be held to release any subsequent damages as to the remaining land of the grantor by the use of the part conveyed for railway purposes.

7. The conveyance of a strip of land to a railway company will not give the grantee the right to make any use of it which would injuriously affect the remaining land of the grantor. The law annexes the condition that the owner of land shall so use it as not to produce injury to another.

8. Under the constitution of 1870, where land has been acquired for railroad purposes by grant as well as by condemnation, all damages to the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price. But no such presumption arises in respect to deeds for right of way under the constitution of 1848.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Will county; the Hon. DORRANCE DIBELL, Judge, presiding.

MESSRS. HALEY & O'DONNELL, for the appellants:

A private person can not sue for a public or common nuisance. *Williams' case*, 5 Coke, 72; 1 Coke's Inst. 560, 556; *Hackney v. State*, 8 Ind. 494; *Lansing v. Smith*, 4 Wend. 10; *Milhan v. Sharp*, 29 N. Y. 611; *Barns v. Racine*, 4 Wis. 454; *Iveson v. Moore*, Ld. Raym. 486; 12 Mod. 263.

As condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from a proper construction of the improvement. Mills on Eminent Domain, sec. 110; *Norris v. Railroad Co.* 28 Vt. 99; 2 Wood on Ry.

Brief for the Appellee. Opinion of the Court.

Law, pp. 919, 923, notes 1, 5; Redfield on Railways, sec. 81, note 1; *Railroad Co. v. Loeb*, 118 Ill. 203; *Dunsman v. Railway Co.* 72 Iowa, 182; *Clarke v. Railroad Co.* 36 Mo. 202; *Railway Co. v. Smith*, 111 Ill. 363.

Mr. BENJAMIN OLIN, and Mr. G. W. BROWN, for the appellee:

Annoyances far less serious than those of which appellants are guilty have been repeatedly declared to be a nuisance on which an action will lie. Wood on Nuisances, (ed. of 1875,) p. 471, sec. 429, p. 599, sec. 570; *Cooper v. Randall*, 53 Ill. 24; 59 id. 324; *Wahle v. Reinbeck*, 79 id. 323; *Whitney v. Bartholomew*, 21 Conn. 213.

A railroad company can claim no greater rights in the use of its property than a private citizen. *Railroad Co. v. Grabill*, 50 Ill. 241; *Snell v. Buresh*, 123 id. 156.

To erect a building and use it in an improper place, to the injury of another, is of itself a wrongful act. (*Whitney v. Bartholomew*, 21 Conn. 212.) But, in any event, private persons who sustain special damages from the acts of the corporation can recover therefor. *Stone v. Railroad Co.* 68 Ill. 395; Wood on Nuisances, 789-792; *Shively v. Railroad Co.* 74 Iowa, 169.

The acts here complained of constitute a use of the premises purchased which was not contemplated, and create an injury in the nature of a new and additional burden to the adjoining premises not purchased. *Railway Co. v. McDougall*, 118 Ill. 229; 126 id. 111.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

This is an action on the case, brought in the Circuit Court of Will County, by the appellee, Elwood, against the appellants, Wylie and Sutherland, and also against the Michigan Central Railroad Company and the Joliet and Northern Indiana Railroad Company, to recover damages sustained by the plaintiff below during the month from June 4 to July 5, 1888, in the use, occupation and enjoyment of his dwelling-

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house, caused by the erection and operation by the appellants of a large coal-shed adjoining said dwelling-house in the city of Joliet, and the handling therein of large quantities of coal by means of machinery driven by steam-power, whereby intolerable noises were produced, and great quantities of coal dust and dirt were cast upon and into said house, which dust and dirt continually settled down in large quantities upon the furniture, books, food, clothing and other things in the house, to the great annoyance of the plaintiff, and so as to be destructive of the comfort and health of himself and his family and cause material injury to his possession, use and enjoyment of his home. Under the instructions of the court, the jury, upon the trial below, found the two Railroad Companies not guilty, and returned a verdict of guilty against the other defendants, the two appellants here. Judgment was entered upon the verdict. The Appellate Court has affirmed the judgment, and the case comes here by reason of a certificate of importance granted by that court.

The dwelling house and the coal-shed are both located upon the south half of Block 17 in Bowen's Addition to Joliet. The south half of this block lies between Jefferson street on the north and Washington street on the south, and between Michigan street on the west and Eastern Avenue on the east. On July 3, 1854, Joel A. Matteson and wife executed a deed conveying to the Joliet and Northern Indiana R. R. Co. the south part of the south half of the block lying between Michigan street and Eastern Avenue, fronting south on Washington street and having a width or depth of 130 feet. It is claimed that this strip, 130 feet wide, was leased by the J. and N. I. R. R. Co. to the Michigan Central R. R. Co., though no such lease was produced in evidence. On May 2, 1887, the Michigan Central R. R. Co. leased the strip to the appellant, J. S. Wylie of Davenport, Iowa, for three years at a nominal rental of \$1.00 per year for the storage and sale of coal, the lessor reserving the right to terminate the lease if the business should

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not be conducted to the satisfaction of the company, or the latter should desire the property for its own use. The coal shed in question was erected upon this strip early in the summer of 1888 by Wylie, whose superintendent or manager is the appellant, Sutherland.

On July 4, 1854, Joel A. Matteson and wife also executed a deed conveying to N. D. Elwood, the father of the appellee, the undivided half of that part of block 17 lying between the south line of Jefferson street and the north line of the strip sold on the day before to the J. and N. I. R. R. Co., said strip having a depth or width of about 145 feet, and extending from Michigan street to Eastern Avenue. Appellee acquired his title as devisee under his father's will, and by deed from his father's executor. His house is located upon the strip so sold to his father, and fronts upon Jefferson street. The south line of his lot adjoins the north line of the lot on which the coal-shed stands, and water from the eaves of the latter falls upon the lot. He built his house, and improved the grounds around it, and occupied it as a home, many years before the coal-shed was erected.

The coal-shed is about 610 feet long, 28 feet high and from 54 to 56 feet wide, built of lumber with a stone foundation and a roof covered with tarred paper. It is open at the west end and on the south side, and has an open space on the north side between the siding and roof, so that the coal dust escapes upon the adjoining premises. Cars are switched from the railroad tracks into the shed upon a raised platform. The coal is thrown into an iron hopper by means of an iron scraper operated by steam power, and is then received into an iron conveyer run by steam, and lifted from 20 to 28 feet high and emptied into a chute or trough plated with iron, and conveyed through the same, and dumped upon the floor through openings in the chute. The shed will store 24,000 tons of coal. In June, 1888, from 15 to 23 car-loads of coal per day were delivered into it, each car-load holding from 12 to 20 tons;

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about 23 cars would be unloaded in one day. This process of lifting, conveying and dumping the coal by means of machinery from the top of the shed to the floor below, in large masses, causes the coal to break and grind upon coming in contact with the iron conveyor, etc., and produces not only deafening noises, but clouds of coal dust.

The evidence tends to show that the locality in question is in a thickly settled portion of the city, and that there are many houses and stores near plaintiff's residence on Jefferson street, and also south of Washington street, and east and west of the other streets above named. Many of the owners and occupants of these houses and stores were put upon the witness stand, and swore that they also were annoyed and injured by the noises and coal dust in question in the use and enjoyment of their respective properties. In *Cooper v. Randall*, 59 Ill. 317, we held, that such testimony was admissible to show the extent and character of the injury sustained by the plaintiff, and as tending to prove that the nuisance objected to was capable of inflicting the injury complained of.

It is urged, however, by the appellants, that, by the testimony thus admitted, the nuisance was shown to have been a public one, and that a private action will not lie for injuries suffered from a public nuisance. Counsel for appellants thus state their position: "the annoyance complained of by the plaintiff is only such as he in common with the public is subjected to, and, therefore, he cannot have a private action to redress his supposed injury."

Undoubtedly the general rule is, that public or common nuisances, which are defined by Blackstone to be those "which affect the public and are an annoyance to *all* the King's subjects," can only be proceeded against by indictment, but it is also a well established rule, that, where a person sustains, by reason of a public nuisance, a special damage different from that which is common to all, he is not precluded from main-

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taining his action for such damage. (Wood's Law of Nuisances, secs. 618 and 653.)

The doctrine, that special damage must be shown in order to justify a private action for injury growing out of a public nuisance, had its origin in the consideration of nuisances growing out of obstructions to highways and navigable streams. For instance, if a man dug a ditch across a public highway, the traveller would have no action for the inconvenience, which he suffered from the interruption in common with the rest of the public, but, if his horse fell into the ditch and was killed, he would thereby suffer a special damage not common to others.

The strictness of the original rule has been greatly modified since the days of Lord Coke. Recovery may be had for damages which are consequential as well as direct. (Wood's Law of Nuisances, secs. 620 and 621.) An individual, who receives actual damage from a nuisance, may maintain a private suit for his own injury, although there may be many others in the same situation. (*Lansing v. Smith*, 4 Wend. 10.) The doctrine now is, that a nuisance may be at the same time both public and private. The use of a steam engine in a crowded street may be a public nuisance, but, in a case where the smoke from it also injured the goods in a man's shop and made his dwelling uncomfortable, it was held to be such a private nuisance as would give him a right of action. (*Idem.* sec. 649.) In *Francis v. Schoellkopf*, 53 N. Y. 162, it was held, that, although the stench from a tannery injured a large number of houses, yet the plaintiff, whose dwelling was made uncomfortable and almost uninhabitable, was entitled to sue for her particular injury.

In the case at bar, if the coal dust falls upon the furniture, food and clothing in appellee's house, he suffers a special damage to his own property, even though it be true that coal dust from the same coal-shed falls upon the man who passes on the street in front of his door, or upon similar articles of property in his neighbor's house. If the noise of the grinding

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machinery deafen him in his own dwelling, the rest and quiet, which he is entitled to enjoy in his home, are disturbed, and he is none the less injured because the home of his neighbor is rendered unendurable from the same cause. Injury to a vested right is a sufficient special damage to maintain an action against the promoter of a public offense. (Wood's Law of Nuisances, sec. 656.) As was said in *Francis v. Schoellkopf, supra*, "it is no defense for a wrong doer, when called upon to compensate for the damages sustained from his wrongful act, to show that he, by the same act, inflicted a like injury upon numerous other persons."

We, therefore, think that the court below committed no error in overruling the motion of the defendants to exclude the plaintiff's evidence, inasmuch as the plaintiff was entitled to maintain his action even though the nuisance in question could be regarded as a public one.

The next error assigned by the appellants is the refusal of the trial court to give certain instructions, which stated to the jury, in substance, that the Michigan Central Railroad Company would have had the right to erect and operate the machinery in the coal-shed, upon the alleged ground that such operation was a lawful railroad use of the right of way, and that the company had a right to license Wylie to do what it could itself thus do; that the original owner of the south half of Block 17, by his deed to the lessor of the M. C. R. R. Co., received a consideration, thereby, for all future injury to the portion of the block retained by him growing out of such lawful railroad use of the part so deeded and sold; that, therefore, appellee, holding title under such original owner, is without redress for the damages occasioned by such use. We are of the opinion that there was no error in the refusal of the instructions in question for the reasons hereinafter stated.

The charter of the Joliet and Northern Indiana R. R. Company has not been introduced in evidence, and, therefore, it does not appear whether or not that Company had any au-

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thority to lease the property to the M. C. R. R. Co., and, if it did so lease it, it does not appear, in the absence of such lease and of the charter of the M. C. R. R. Co. from the record, whether or not the latter company was authorized to make the lease to Wylie. Nor does it appear, from either of the deeds above referred to, or otherwise, that the land, on which the shed stands, was conveyed to the J. and N. I. R. R. Co., or held by it, as right of way. But we will treat the case, as the counsel on both sides seem to do, as though the M. C. R. R. Co. was the lessee of the J. & N. I. R. R. Co., and as though the coal-shed stood upon the railroad right of way, and as though the appellants were authorized to use the shed and the machinery in it for the same purposes for which their lessor could have used it.

First, the deed from Matteson to the J. and N. I. R. R. Co. did not recite that the strip therein described was conveyed for the purpose of constructing a railroad, or for any purpose connected with the construction or use of a railroad, or for any purpose connected with the preservation, occupation and enjoyment of a railroad. It was a simple conveyance of land in fee simple without any reference to the use to which it was to be applied. When it was made, no part of the J. & N. I. railroad had been built. Moreover, the deed was executed in 1854 while the constitution of 1848 was in force. Under that constitution, compensation, in condemnation proceedings, was only awarded for the land taken, and not for damages to the land not taken. It cannot be claimed that a simple deed or grant of land for right of way, to a railroad company will be presumed to have any greater effect than a condemnation judgment. It is said that, as condemnation proceedings are presumed to consider and include all damages suffered, so deeds of rights of way are presumed to include all damages arising from a proper construction of the improvement. But it is difficult to understand how, under the constitution of 1848, where the owner only received, as the result of the con-

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demnation proceeding, compensation for the land taken and not damages to the land not taken, a deed of land to a railroad company, made when that constitution was in force, can be presumed to have been in consideration both of compensation for the land conveyed and of future damages to the land not conveyed, in the absence of anything on the face of the deed to show that the land was conveyed for any particular purpose, or that the parties had in mind any damages to accrue to other land. (*C., R. I. & P. Ry. Co. v. Smith*, 111 Ill. 363; *C. & E. I. R. R. Co. v. Loeb*, 118 id. 203.)

The position of appellants is, that the consideration of the deed from Matteson to the J. & N. I. R. R. Co. included not only the value of the strip 130 feet wide thereby conveyed, but also all damages thereafter to result from the construction and operation of the railroad to the strip 145 feet wide deeded the next day to N. D. Elwood. In *C., R. I. & P. Ry. Co. v. Smith*, *supra*, we said: "A mere conveyance of a tract of land might not give to the grantee the right to make any use of it which would injuriously affect any other land, for the law would attach the same condition as in general exists with respect to the holding of all land,—that the owner shall so use it as not to produce injury to another; but in the case before us there is the grant for this very use itself which will injuriously affect other land, and for no other use."

The doctrine announced in some of the text books, that, where land has been acquired for railroad purposes by deed or grant, as well as by condemnation, all damages to the portion of the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price, may well be applied to such a deed or grant made in this State since the constitution of 1870 went into force. That instrument provides that "private property shall not be taken, or *damaged*, for public use without just compensation." But the doctrine can certainly have no reference to a simple deed, made before the adoption of the constitution

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of 1870 and containing no statement of any use which was to be made of the land conveyed. It is to be noted, that the point here discussed is, not whether there was any remedy for injury to the land not taken before the adoption of the constitution of 1870, but whether damages for such injury could be regarded as paid for by the price named in such a deed, conveying the land taken as the deed above described. We think that such could not be the effect of the deed.

Second, in any case where the doctrine contended for can be applied, it only contemplates that the grantor or those holding under him shall be prevented from recovering damages for such injuries as arise from the proper construction of the road, and such as necessarily result from or attend upon its ordinary and prudent operation. Railroads are a public necessity and a public benefit. Many inconveniences and annoyances grow out of their operation which must be borne by the public. The passage of a train of cars upon the street of a city or town is necessarily attended with noise, with the emission of smoke, with detention at the crossings, etc. No recovery can be had for injuries suffered from such causes.

But a railroad company has the power to do certain things, which it has also the discretion to do in particular ways and at particular places. It needs grounds upon which it may receive and discharge its freight and passengers. It may use its right of way for such purposes. Its discharge of a certain kind of freight at one place upon its right of way may work serious injury to property owners, while its discharge of the same at another place thereon may not produce any such injury. The selection of a locality, where damages are inflicted, in preference to one where damages will not be inflicted, cannot be said to be necessary to the ordinary and prudent operation of the road.

In the present case, the company, or those authorized by it, thirty three or thirty four years after the original construction of the road, erected this coal-shed, and placed in it a new con-

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trivance, worked by steam power, for unloading coal, in the heart of a city, in a locality thickly settled and surrounded by residences and stores, creating thereby grinding, grating noises, and scattering dust and dirt that destroy the comfort and injure the health of those living upon the adjoining property. Here was a new use of the right of way not contemplated at the time of the original grant, not resorted to for many years thereafter. The construction of the shed in 1888 could not have been anticipated by appellee, who built his house in 1876 and began to occupy it in 1881.

This structure, though not a nuisance *per se*, became such by reason of the particular locality in which it was situated. It is as much the duty of a railroad company as of an individual to so use its property as not to injure others. The question whether or not the coal-shed and its machinery were located in a proper place was fairly left to the jury by the instructions of the court.

In *I. C. R. R. Co. v. Grabill*, 50 Ill. 241, where a cattle pen, kept by the R. R. Company near the premises of the plaintiff, was the source of noxious smells, rendering such premises unwholesome and uninhabitable, it was held that such indispensable structures, even though the right existed to erect them in the heart of a city, ought to be located at such a distance from populous neighborhoods as to avoid the injurious results produced by them.

In *Cooper v. Randall et al.* 59 Ill. 317, which was an action for damages to plaintiff's premises arising from a flouring mill on a lot near such premises, which threw upon them chaff, dust, dirt and other impurities, the following instruction was approved: "A flouring mill is not necessarily a nuisance, nor unlawful in its use, management or purpose. A man has a right to erect a mill *in a proper place*—to run, use it, etc., in a proper manner; * * * and if said mill is *in a proper place*, used and operated in a proper manner, and without material injury to the possession or reversionary right or interest of

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plaintiff, jury should find for defendants." "Material injury" was there defined to be a real and not imaginary or fanciful interference with the reasonable enjoyment of the property.

In *Whitney v. Bartholomew*, 21 Conn. 213, the action was for damages to plaintiff's property by reason of a carriage factory and blacksmith's shop occupied by defendant on his own land adjoining the lot on which stood the plaintiff's dwelling-house. It was shown that cinders, ashes and smoke from the chimneys of the shop were thrown upon plaintiff's house, land, clothes, etc., and that the ashes, etc., fell into her well, etc. Judgment for plaintiff was affirmed, and it was there held, that the factory and shop were not nuisances *per se*, but that "the shop was erected and the business pursued in an improper place;" that some things, not unlawful, become so "in respect to the time, place or manner of their performance;" that defendant was bound to use the shop, even though on his own land, so as not to injure his neighbor; "that of trades which are lawful, some may be nuisances in cities, which are harmless in the country."

Shively v. Cedar Rapids, J. F. and N. Ry. Co. 74 Iowa, 169, was an action against a railroad company to recover damages, wherein it appeared that the company built and maintained stock-yards within 60 feet of plaintiff's lot for the use of shippers over the road, and that there were emitted therefrom foul odors, which rendered plaintiff's house almost uninhabitable and endangered his health, etc. It was claimed, that the yards were necessary to the operation of the road, and that the odors could not be prevented even where the yards were properly conducted. Judgment for plaintiff was sustained, and the court said: "It is not shown that they (the odors) are unavoidable, nor does it appear that the yards might *not have been located at another place* where they would have met the necessities of the road and its patrons."

It was also left to the jury by the instructions in this case to say whether this particular mode of handling coal and un-

Syllabus.

loading it from cars was a proper mode or not. If unloading coal in this shed with such machinery upon the company's right of way was a part of the necessary operation of the road, plaintiff could not be precluded from a recovery for injuries thereby suffered, unless such process of unloading was prudent, careful and proper.

We perceive no error in the record which would justify a reversal. The judgment of the Appellate Court is accordingly affirmed.

Judgment affirmed.

WILLIAM DRURY

v.

WASHINGTON WOLFE.

Filed at Ottawa October 31, 1890.

1. USURY—*interest upon interest*. On a loan of \$3000, at the time interest might be reserved at the rate of ten per cent per annum, the borrower gave his four notes to the lender,—one for \$2000, payable in one year; one for \$2500, payable in two years; one for \$2500, payable in three years; and one for \$3275.80, payable four years after date, all calling for ten per cent interest after maturity: *Held*, that the notes, including more than ten per cent simple interest, were usurious.

2. The general rule is, parties can not be bound by any contract made before interest is due, for the payment of compound interest.

3. But after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest.

4. There is, perhaps, an exception to the general rule mentioned, in the case of interest coupons annexed to commercial paper. Such coupons bear interest. But in such case interest is not compounded indefinitely.

5. There is, therefore, no authority found in this exception for holding that interest may be compounded indefinitely, or at all, in cases where the payment of interest is not secured by some negotiable instrument independent of the instrument whereby the original indebtedness is promised to be paid.

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137 435
134 207
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Brief for the Appellant. Opinion of the Court.

APPEAL from the Appellate Court for the Second District;— heard in that court on appeal from the Circuit Court of Mercer county; the Hon. JOHN J. GLENN, Judge, presiding.

Messrs. PEPPER & SCOTT, for the appellant:

The transaction was not usurious. *McGill v. Ware*, 4 Scam. 21; *Mitchell v. Lyman*, 77 Ill. 525; *Brown v. Mortgage Co.* 110 id. 235; *McFadden v. Fortier*, 20 id. 509.

Messrs. BASSETT & BASSETT, for the appellee.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

Wolfe being indebted to Drury, \$8000, for loaned money, gave him his four promissory notes therefor, as follows: One for \$2000, payable one year after date; one for \$2500, payable two years after date; one for \$2500, payable three years after date; and one for \$3275.80, payable four years after date,—all bearing interest at the rate of ten per cent per annum after due. The rate of interest then allowed by our statute for money loaned was ten per cent per annum, and any sum charged for the use of money greater than that rate would produce, was usury. The question is, under that statute is there usury in these notes?

It is impossible to so calculate simple interest in advance upon \$8000, for the respective times of these notes, at the rate of ten per cent per annum, as to produce, when added to its principal, their several amounts. A calculation will demonstrate that to produce the amounts of these notes, at ten per cent per annum, simple interest, will require the use of \$1818.18 $\frac{2}{1}$ for one year, \$2083.33 $\frac{1}{3}$ for two years, \$1923.07 $\frac{1}{8}$ for three years, and \$2339.85 $\frac{1}{2}$ for four years,—aggregating \$8164.43, and being greater than the amount of money loaned \$164.43,—and so, necessarily, there must be usury in the notes.

 Opinion of the Court.

But counsel say, the amounts of the several notes were determined thus:

"Principal, - - - - -	\$8000.00
One year's interest, at ten per cent, - - -	800.00
	<u>\$8800.00</u>
Deduct amount to be paid according to contract,	
which was put in first note, - - - - -	2000.00
Balance, - - - - -	<u>\$6800.00</u>
Second year's interest, - - - - -	680.00
	<u>\$7480.00</u>
Deduct amount to be paid according to contract,	
put in second note, - - - - -	2500.00
Balance, - - - - -	<u>\$4980.00</u>
Third year's interest, - - - - -	498.00
	<u>\$5478.00</u>
Deduct amount to be paid according to contract,	
put in third note, - - - - -	2500.00
Balance, - - - - -	<u>\$2978.00</u>
Fourth year's interest, - - - - -	297.80
Put in fourth note, - - - - -	<u>\$3275.80"</u>

But it is plain that the effect of this is to charge compound interest. Nothing is in fact paid, and the amount to be paid is the amount of these several notes, which can be reached only by compounding interest.

But counsel contend that the mode here adopted to reach these amounts is sanctioned by *McFadden v. Fortier*, 20 Ill. 509. That case simply applies the now familiar rule, that where payments are made upon an interest-bearing debt before the satisfaction of such debt, interest shall be computed upon the debt to the time of the first payment, and if the payment exceeds the interest, the interest shall be added to the principal, and the amount of the payment deducted from the sum, and interest shall then be computed upon the remainder until the next payment, etc. The difference between

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that case and the present is, simply, voluntarily paying interest due at different times selected by the debtor, before the payment of the debt, and agreeing, in advance, to make interest principal as it shall mature, and thereafter bear interest,—or, in other words, the difference between voluntarily paying interest matured upon a debt, from time to time, and agreeing, in advance, to pay compound interest upon a debt.

The general rule recognized by this court is, parties can not be bound by any contract made before interest is due, for the payment of compound interest. (*Leonard v. Villars, Admr.* 23 Ill. 377; *First Nat. Bank of Galesburg v. Davis*, 108 id. 633; *Harris v. Bressler*, 119 id. 467; *Peddicord v. Connard*, 85 id. 102; *Leonard v. Patton*, 106 id. 99.) But after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest. *Thayer v. Wilmington Star Mining Co. et al.* 105 Ill. 540; *Gilmore et al. v. Bissell*, 124 id. 488; *McGovern v. Union Mutual Life Ins. Co.* 109 id. 151; *Van Benschooten v. Lawson*, 6 Johns. Ch. 314.

There is, perhaps, an exception to the rule as first above stated, in the case of interest coupons annexed to commercial paper. Such coupons bear interest. (*Benneson et al. v. Savage et al.* 130 Ill. 353, and cases there cited.) But in such case, interest is not compounded indefinitely. Interest is simply payable upon the amount of the face of the coupon, and that the coupon bears interest is solely because of the character given it by commercial usage. *Aurora v. West*, 7 Wall. 105; *Mercer v. Hackett*, 1 id. 83; *Meyer v. Muscatine*, id. 384.

There is therefore no authority in this for holding that interest may be compounded indefinitely, or at all, in cases where the payment of interest is not secured by some negotiable instrument independent of the instrument whereby the original indebtedness is promised to be paid.

We find no satisfactory reason for disturbing the judgment of the Appellate Court, and it is therefore affirmed.

Judgment affirmed.

Syllabus.

MINERYA HALL PURDY

v.

EDGAR A. HALL et al.

Filed at Ottawa October 31, 1890.

1. **WILLS—contest of will—testator's knowledge of contents—presumption—degree of evidence.** In the absence of evidence, it will be presumed that a person who executes a will or other instrument does so with a knowledge of its contents; but this is a presumption which will readily yield to evidence tending to show that such was not the fact.

2. Where a will has been written, or procured to be written, by a person largely benefited by it, that is a circumstance to excite stricter scrutiny, and require stricter proof of volition and capacity. In such case, the proof must satisfy the court or jury that the testator has not been imposed upon, but knew what he was doing, and the disposition he was making of his property, when he made the will.

3. **SAME—burden of proof—on contest of will.** On the contest of a will by bill in chancery, the trial is *de novo*, and the burden of proof is primarily upon the proponents of the will, and they are required to show that the will was in writing, and signed by the testator, or by some person in his presence and by his direction, and was attested in his presence by at least two witnesses, and that the testator was of sound mind and memory at the time of signing or acknowledging the same.

4. The statute makes the certificate of the oaths of the attesting witnesses at the probate, evidence on the hearing upon the bill; and when such evidence is admitted covering the points prescribed by section 2 of the Statute of Wills, it will *prima facie* establish the will, and the burden will then be shifted to the complainants contesting the same.

5. **SAME—evidence—copy of will.** On the trial of an issue whether an instrument of writing is the last will of a deceased person, it is error for the court to allow the defendants to introduce in evidence a certified copy of the will. The original should be produced, or its absence properly accounted for.

6. **ALLEGATIONS AND PROOFS—must correspond.** A complainant in chancery is not permitted to state his case one way in his bill and make another and different showing by the testimony. He must recover, if at all, on the grounds stated in his bill. The *allegata* and *probata* must correspond.

7. So where a bill in chancery is filed for the purpose of setting aside the probate of a will, the complainant will be allowed to impeach

134 298
143 252
146 342

134 298
147 123
148 43

134 298
150 559
151 161
151 437
152 72

134 298
160 322
49a 310
50a 673

134 298
158 398

134 298
54a 566

134 298
167 307

134 298
168 45

168 480
168 496

168 517
168 614

134 298
174 198

134 298
77a 439

134 298
177 89

134 298
82a 387

134 298
186 *121

186 119

134 298
90a *370

134 298

192 *535
f192 *536

134 298

194 * 61

134 298

198 *257

134 298

204 393

204 395

134 298

f114a *632

134 298

215 *545

Statement of the case.

the *prima facie* case made in favor of the validity of the will only upon the particular grounds that are alleged in his bill of complaint.

8. PRACTICE—*directing what the verdict shall be.* Where the evidence given at the trial of a cause, with all the inferences that can justifiably be drawn from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. This rule applies on bill filed to contest a will.

9. Where the evidence on the part of the contestant of a will, in the absence of any rebutting testimony on the part of the proponents, is such as to justify a verdict setting aside the will, it will be error for the court to direct the jury to find a verdict in favor of the will.

10. In this case, on bill to set aside a will, it was alleged that the testator was induced to sign the same by undue influence, fraud and compulsion on the part of the principal devisees, and that they misrepresented to him the contents of the instrument which he signed. There was no proof that the will signed was ever read to the testator, and it appeared that the principal devisee, instead of procuring the person to write the will desired by the testator, brought another lawyer of his own selection, and the will was drawn by such lawyer in the presence of the testator and such devisee, and there was proof tending to show that an undue influence was exercised. The court below directed the jury to find for the proponents of the will: *Held*, that the court erred in so directing the verdict, and that the evidence should have been left to the jury.

APPEAL from the Superior Court of Cook county; the Hon. EGBERT JAMIESON, Judge, presiding.

Appellant filed her bill of complaint in the Superior Court of Cook county, in which she alleged, that on August 8, 1888, Loammi Hall, since deceased, executed an instrument in writing, which purported to be his last will and testament, and died on or about August 14, 1888, and that on August 18, 1888, said will was probated in the probate court of Cook county. The names of the heirs-at-law that the deceased left him surviving were given in the bill, and the will was set out therein verbatim. The object of the bill was to set aside the will as invalid, and the charging parts of it, with reference to such invalidity, were in substance as follows: That at the time of the execution of the instrument Loammi Hall was a

Brief for the Appellant.

bachelor, sixty-nine years old, and, in his last sickness, feeble in body and mind, and was induced to execute it by and through the undue influence and compulsion and fraud of Edgar A. Hall, Zebulon M. Hall, and Catherine Hall, wife of Zebulon M. and mother of Edgar A. Hall, who conspired with her husband and son in the premises, and by the said persons misrepresenting to the deceased the contents of the said instrument; that after it was executed it was taken away from the said deceased, and kept out of his power and control, by the said Edgar, or some one at his suggestion, and that the same persons, and especially said Catherine Hall, would not allow the neighbors, friends and relatives in whom the deceased had confidence, to approach him, although he desired to see and communicate with them, and although the deceased wished to get possession of the said will and to destroy it, he having become suspicious that it did not contain his true will, as in fact it did not, and he was prevented from obtaining possession of and destroying the same, through the fraud and compulsion of the same Edgar A., Catherine and Zebulon M. Hall and their confederates.

Answers were filed denying the allegations of the bill, and a jury was impaneled and sworn to try the issue formed.

Appellees gave in evidence certified copies of the will, and of the order of the probate court admitting the same to probate, and also the evidence of the attesting witnesses which was taken at the time said will was probated. Appellant then introduced her testimony, and when she rested her case, the court, over her objections and exceptions, directed the jury to return a verdict sustaining the will.

Mr. H. B. HURD, for the appellant:

The court erred in admitting in evidence a certified copy of the will, and proceedings in the county court. The issue made up is, whether the writing produced be the will. Section 18 of the Statute of Wills has no application.

Brief for the Appellant.

Undue influence, compulsion and fraud may be proved by circumstantial evidence, and the jury are the judges of the weight of the evidence. 1 Jarman on Wills, 30; *Moyer v. Syrgart*, 125 Ill. 262; *Marvin v. Marvin*, 3 Abb. 192; *Brick v. Brick*, 66 N. Y. 144; *Lee v. Dill*, 11 Abb. Pr. 214; *Reynolds v. Adams*, 90 Ill. 134; *Keithley v. Stafford*, 126 id. 507; *Tyler v. Gardiner*, 35 N. Y. 559; *McLaughlin v. McDevitt*, 63 id. 504; Bigelow on Frauds, 476; *Rash v. Purnell*, 2 Harr. 457; *Haydock v. Haydock*, 33 N. J. Eq. 494; *Taylor v. Wilburn*, 20 Mo. 306; *Reynolds v. Root*, 62 Barb. 250; *Forman v. Smith*, 7 Saw. (N. Y.) 443; *Davis v. Rogers*, 1 Huston, 44.

When a confidential relation exists,—such as that of client and attorney, or patient and physician,—between a testator and a large beneficiary under a will, far less will be deemed undue influence than in other cases. Indeed, when the relation is once shown to have existed, it appears to devolve upon the beneficiary to show a clear intention, or that no pressure was brought to bear by him, or by his procurement, upon the testator. Bigelow's note to 1 Jarman on Wills, 36, note 1; *Barry v. Butlin*, 1 Curteis, (Eng. Ecc. Rep.) 637; *Walker v. Smith*, 29 Beav. 394; *Riddell v. Johnson*, 26 Gratt. 152; *Meek v. Perry*, 36 Miss. 190; *Wilson v. Moran*, 3 Bradf. 172; *Crispell v. Dubois*, 4 Barb. 393; *Downey v. Murphy*, 1 Dev. & Bat. 82; *Harvey v. Sullens*, 46 Mo. 147; *Boyd v. Boyd*, 66 Pa. St. 283; *Wright v. Howe*, 7 Jones, 412; *Breed v. Pratt*, 18 Pick. 115.

Although, ordinarily, it need not be proven that the testator was acquainted with the contents of the will, unless the question is raised, and some circumstances or evidence seem to point to the contrary, yet the fact that Edgar A. Hall brought another lawyer than the one desired by the testator; that he attended the lawyer while the will was being drawn; that he is made executor and residuary legatee, and he and his family, whom the sick man disliked, and to whom he had frequently declared he would leave nothing, are given the bulk of the property, while those who were the objects of the testator's

affections and intended benefactions are left out; that it differs from the testator's oft-repeated declarations of his intentions, and also differs from the disposition the testator had indicated the day the will was executed, and afterward, cast the burden upon the proponents to show that the testator was acquainted with the contents of the instrument. It is said in *Montague v. Allen*, 78 Va. 592, that the circumstances that the person who drew the will was in confidential relations with the testator, and his wife was the principal beneficiary, certainly engender suspicion and arouse the vigilance of the court and jury, and if unexplained or repelled they would annul the transaction. *Tribe v. Tribe*, 1 Rob. 775; *Paske v. Olcott*, 2 Phil. 323; *Durling v. Loveland*, 2 Curt. 225; *Baker v. Batt*, 2 Mod. P. C. 317.

MESSRS. BRANDT & HOFFMAN, and MESSRS. COMSTOCK & HESS,
for the appellees:

Appellees were not required by law to produce in court the original will. There was no dispute as to the terms of the will.

The testimony of the subscribing witnesses, when read in evidence, made a *prima facie* case, and threw the burden of proof on the complainant. *Holloway v. Galloway*, 51 Ill. 161; *Potter v. Potter*, 41 id. 83; *Carpenter v. Calvert*, 83 id. 71.

Appellees were not bound to prove the execution of the will, as that was not put in issue. *Carmichael v. Reed*, 45 Ill. 108.

A party is not permitted to state one case by his bill and another case by the testimony. *McKay v. Bissett*, 5 Gilm. 499; *White v. Morrison*, 11 Ill. 361; *Rowan v. Bowles*, 21 id. 17.

The court properly instructed the jury to find the will valid. As to the undue influence required, see *Roe v. Taylor*, 45 Ill. 491; *Rutherford v. Morris*, 77 id. 397; *Allmon v. Pigg*, 82 id. 149; *Yoe v. McCord*, 74 id. 33; *Brown v. Riffin*, 94 id. 560; *Freeman v. Easley*, 117 id. 317; *Bice v. Hall*, 120 id. 597.

A man may disinherit even his children, and give his entire property to strangers. *Heuser v. Harris*, 42 Ill. 429; *Uhlich v. Muhlke*, 61 id. 523; *Freeman v. Easley*, 117 id. 317.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court:

With reference to the statutory proceeding to contest, by bill in chancery, the validity of a will, it is expressly stated in the statute (Rev Stat. 1874, chap. 148, sec. 7,) that the issue shall be tried by a jury; and it follows, that in regard to the action of the court in taking the case from the jury and directing a verdict against the contestant, the same rule must be applied that obtains in respect to trials in suits at law. The rule in actions at law is, that when the evidence given at the trial, with all the inferences that could justifiably be drawn from it, is so insufficient to support a verdict for the plaintiff, that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. *Phillips v. Dickerson*, 85 Ill. 11; *Frazer v. Howe*, 106 id. 573; *Simmons v. Chicago and Tomah Railroad Co.* 110 id. 346.

It is manifest, then, that if the evidence introduced by appellant was such that it would, in the absence of any rebutting testimony on the part of appellees, have justified a verdict in her favor, then the court erred in instructing the jury to return the verdict they did. And it is equally plain, that if the reverse of this proposition be true, then there was no error in the action of the court.

There is some evidence in the record, but of quite an unsatisfactory character, tending to prove that the testator did not sign or acknowledge the will in the presence of two witnesses, and that it was not attested by two witnesses in the presence of the testator, and it is insisted by appellant this evidence was sufficient to entitle her to have the question submitted to the jury whether the supposed will had been executed and attested as required by the statute. The trial in this suit was *de novo*, and the burden of proof was, primarily, upon the proponents of the will, and they were required to show that the will was in writing, and signed by the testator, or by some

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person in his presence and by his direction, and was attested in his presence by two or more witnesses, and that the testator was of sound mind and memory at the time of signing or acknowledging the same. (*Rigg v. Wilton*, 13 Ill. 15; *Carpenter v. Calvert*, 83 id. 62; *Tate v. Tate*, 89 id. 42; *Moyer et al. v. Swygart*, 125 id. 262.) The statute expressly provides, that at the trial the certificate of the oath of the witnesses at the time of the first probate shall be admitted as evidence. When the proponents put in evidence the testimony of the attesting witnesses given when the will was probated, covering the points prescribed by section 2 of the Statute of Wills, then the competency of the testator to make a will, and the fact that the will in controversy was signed and attested as required by the statute, were *prima facie* established. The burden of proof then shifted to the shoulders of the complainant, who was seeking to impeach the validity of the will. *Holloway v. Gallo-way*, 51 Ill. 159; *Buchanan v. McLennan*, 105 id. 56; *Keithley v. Stafford*, 126 id. 507.

The rule which prevails in this State is, that when a bill in chancery is filed for the purpose of setting aside the probate of a will, the complainant in such bill can impeach the *prima facie* case made in favor of the validity of the will, only upon the particular grounds of objection that are alleged in the bill of complaint. In *Carmichael et al. v. Reed et al.* 45 Ill. 108, the bill charged mental incapacity and undue influence, and the jury found against the will, but upon the ground, which was insisted upon by complainants in their proofs, that the testator had made two wills, one of which was, and the other was not, properly attested, and that the wife of the testator, for sinister purposes, when directed by the testator to produce for attestation one of these wills, fraudulently produced the other, so that the will of February, 1865, instead of the will of August, 1868, received the proper attestation. The decree was reversed, and it was there said: "It is sufficient to say, in answer to this ground of claim, that it is nowhere alleged

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in the bill there was such a substitution of wills, nor any allusion to such a fact; nor is the bill, in any sense, predicated upon such a fact, but simply upon the grounds of undue influence, and incapacity to make a will. * * * The complainants could not prevail on the fact of substitution, if proved, as it is not alleged in the bill. They are not permitted to state a case one way in their bill, and make another and a different case by the testimony."

Flinn et al. v. Owen et al. 58 Ill. 111, is a still stronger case in affirmance of the rule above suggested. The allegations in the bill were, undue influence of the wife, and that after procuring the execution of the will she obtained possession of it; that the testator desired to destroy it, which she promised to do, and subsequently told him she had destroyed it, upon which assurance he relied. The bill also contained another allegation, the substance of which was, that the so-called will was illegally executed, because the subscribing witnesses did not attest it in the presence of each other. The question to which the evidence was directed, and on which the case was submitted to the jury by the instructions, was, whether both the subscribing witnesses, one of whom was dead, had signed the will in the presence of the testator. The decree was reversed, and the court said: "The *allegata* and *probata* must correspond." And further said: "There were no facts averred in the bill to which the evidence that controlled the case properly applied. The allegation was, in substance, that the witnesses did not sign in the presence of each other, and the evidence offered was to show they did not sign in the presence of the testator." It will be noted that the point, the negative of which was not averred in the bill, was one which the proponents of the will were obliged, in the first instance, to show affirmatively in making out their *prima facie* case.

The rule that imposes upon the assailants of a will the duty of stating in their bill of complaint the ground upon which it is claimed that the will which has already been admitted to

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probate is invalid, is eminently just and equitable, since it enables those who claim under the will to prepare for trial upon the real issues upon which the controversy is to be decided, and prevents their being taken by surprise by the testimony introduced. It is not perceived that it was the legislative intention, in giving this statutory remedy by bill in chancery, to change the rule which prevails in respect to other bills in chancery, that a complainant can not state one case in his or her bill of complaint, and prove another and different case by the testimony.

Our conclusion is, that appellant can take nothing by her claim based upon this branch of the case, and for the reason there is no allegation in the bill showing that the will was not properly signed and attested.

Among other things it was charged in the bill that the testator was induced to execute the will by and through the undue influence and compulsion and fraud of Edgar A. Hall, Zebulon M. Hall and Catherine Hall, and that they misrepresented to him the contents of the instrument which he signed. Did the appellant introduce testimony from which the jury could reasonably infer either the compulsion, misrepresentation, fraud or undue influence alleged in the bill?

The property devised by the will in controversy was of the value of about \$100,000. The substance of that will was, that it gave to appellant, his only sister of the whole blood, who was a widow with several children, a farm worth some \$7000; to Ellen Nelson, his aged housekeeper, a life estate in twenty acres of land; to his brother of the half blood, and two sisters of the half blood, all of whom were residents of distant States, the sum of \$1500 each; and disposed of the residue of the estate by making various devises to his brother, Zebulon M. Hall, and each of the four children of the latter, and by making one of said children, Edgar A. Hall, residuary devisee and legatee, and executor.

Opinion of the Court.

Since, in the view we take of the case, the issues must be submitted to another jury, we do not deem it advisable to discuss the evidence in detail. Suffice it to say, that there was testimony from which the jury might legitimately have reached these conclusions, to-wit: That the disposition made by Lomami Hall of his property, in the instrument which he signed, was not, in some respects, in accord with his probable intentions; that he believed he had been wronged and injured, pecuniarily, by improper conduct of his brother, Zebulon M. Hall, and harbored feelings of resentment and dislike towards him; that for some time he had not been on intimate terms with him or his family; that when it became apparent that he was stricken with mortal sickness, this brother, with his wife and children, came to his house and farm, and virtually assumed control both of his premises and person, much to his discontent and dissatisfaction; that Zebulon M., Catherine and Edgar A. were all anxious he should make a will, and that one of them incited the old housekeeper, Mrs. Nelson, by a bribe, to induce him to make a will, and that when the matter was suggested to him by her, he at once consented to do so, nothing being said as to the terms of such will. Further, that the deceased at once sent the said Edgar A. Hall to Norwood Park to get Judge Collins to prepare the will; that he did not get Judge Collins, but consulted with another lawyer of his own selection, and the next morning brought such other lawyer to the house; that the will was written by such lawyer in the presence of said Edgar A. and the testator, no other person or persons being present; that the testator, although sensible and apparently in his right mind, was a very sick man, and very weak in body, and able to speak but a few words at a time, and that he that morning said to Mrs. Nelson, "that he was so sick he could hardly make his will, but was forced to do it; that she should keep still, because they would almost kill him, and that he would do all they wanted if they would only leave him alone." Further, there was no evidence,

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either in the *prima facie* case made by appellees, or otherwise in the record, except the presumption arising from the fact of execution, tending to show that the instrument in question was either read over to the testator, or he was in any way informed of its contents.

The law, in the absence of all evidence, will presume that a person who executes a will or other instrument, does so with knowledge of its contents; but this is a presumption which will readily yield to evidence tending to show that such was not the fact. (*Keithley v. Stafford*, 126 Ill. 507.) Naturally, the mind sympathizes with the body in that which debilitates, and, even when not otherwise impaired, it may become so wearied from long continued, serious and painful sickness, that it is willing to purchase rest and quiet at any price, and when in that condition it is susceptible to undue influence, and is liable to be imposed upon by fraud and misrepresentation. The feebleness of the mind of the testator, no matter from what cause,—whether from sickness or otherwise,—the less evidence will be required to invalidate the will of such person. (See *Reynolds et al. v. Adams*, 90 Ill. 134.) So, also, the doctrine is, and it seems to be based on strong grounds of reason and justice, that where a will is written or procured to be written by a person largely benefited by it, it is a circumstance to excite stricter scrutiny, and requires stricter proof of volition and capacity. See 1 Jarman on Wills, (4th Am. ed.) 42, and cases there cited. And the increased strictness of scrutiny and proof required in cases of that character is such as to give full and entire satisfaction to the court or jury that the testator was not imposed upon, but that he knew what he was doing and the dispositions he was making when he made his will. *Ibid.* 45, and cases cited.

Without further discussion of the matter we may announce that our conclusion is, that under the circumstances of this case, and in view of the fact that the will gave the bulk of a large and valuable estate to Edgar A. Hall and his immediate

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relatives, and that said Edgar did not get the lawyer in whom the testator had trust and confidence, and whom he desired should draw his will, but procured the services of another lawyer of his own selection, and that the will was prepared by such lawyer in the presence of said Edgar and the testator, no one else being present, and that all the testimony introduced by appellees, or otherwise in the record, may be true, and yet the fact be that the will was not read to the testator or he otherwise informed of its contents, the duty and burden were imposed upon the proponents of the will to show that the testator, when he signed the will, knew what disposition he was making of his property. We think the court erred in taking the case from the jury, and directing them, peremptorily, to return a verdict in favor of the validity of the will.

The further point is made by appellant, that it was error to permit the defendants to the bill to introduce in evidence a certified copy of the will, and the order of the court admitting it to probate. While the statute provides for the admission in evidence of the testimony taken at the time of the first probate, yet the trial of the issues in the chancery suit is *de novo*, and without regard to the fact that the instrument has been admitted to probate. (*Rigg v. Wilton*, 13 Ill. 15.) It follows, that the order of court in question was not proper or competent evidence, and it was calculated to influence the verdict of the jury in favor of the validity of the will. The statute authorizing a bill in chancery to contest the validity of a will says, in terms, that "an issue at law shall be made up whether *the writing produced* be the will of the testator or testatrix, or not." It is manifest from its language that the statute contemplates that the original writing shall be produced in evidence at the trial. Where the charge in the bill is, that the writing is a forgery, or has been changed since it was signed or acknowledged and attested, and in other cases which might readily be suggested, it would seem the production of the original would be of the utmost importance, and it

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is possible that in almost any case of a contested will there may be something apparent upon the face of the instrument which will shed light upon the questions at issue. There is nothing in this view which is inconsistent with section 18 of the Statute of Wills. We think that in trials of the kind now under consideration, either the original writing should be produced, or good cause shown for not producing it.

In that which we have said in respect to the introduction in evidence of the order of the probate court and of the certified copy of the will, we do not wish to be understood as holding that such introduction would in all cases be reversible error, or even that, under the circumstances of the present case, the rulings of the court in that behalf would afford, of themselves, sufficient ground for reversing the decree.

The decree is reversed, and the cause remanded for another trial.

Decree reversed.

MARY J. GREEN

v.

THE PHOENIX MUTUAL LIFE INSURANCE COMPANY *et al.*

Filed at Ottawa October 31, 1890.

1. SANITY—*quantum of evidence—to overcome the presumption of sanity.* As the law presumes the sanity of all persons, the burden is cast upon the party alleging insanity at a particular time, to establish it by a preponderance of proof. No rule can be laid down as to the quantum of evidence necessary to establish insanity, except that it must be sufficient to overcome the legal presumption of sanity, and to overbalance the testimony tending to sustain such presumption.

2. PRACTICE—*limiting number of witnesses and quantum of proof.* The trial court must of necessity exercise a discretion as to the number of witnesses to prove a given fact that is not disputed, or that is collateral to the main issue, depending very much upon the nature and subject matter of the inquiry. Where a particular point appears to the court to be satisfactorily established, the calling of further witnesses

134 310

138 158

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Statement of the case.

may be stopped, subject, however, to the right to recall, should the point be subsequently disputed.

3. On the hearing of a cause in chancery involving the sanity of the complainant at a former period, as affecting his capacity to execute certain deeds of trust involved in the litigation, after the examination of eight witnesses by complainant on that question, the court limited the parties each to nine witnesses, including those already examined on the question of sanity, and found the issue for the defendants: *Held*, that the court erred in limiting the number of witnesses, especially so after the complainant had examined the greater part of his nine witnesses before the rule was announced.

4. If the power of the trial court to limit the number of witnesses, as so exercised, existed, which was not conceded; it should have been done at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as he might have deemed most important.

APPEAL from the Circuit Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

This bill was filed by appellant on November 16, 1886, in the circuit court of Cook county, against the Phoenix Mutual Life Insurance Company, Aaron C. Goodman, Lemuel Baldwin, Ptolmey E. Hosmer and Lyman Baird, to set aside a sale made by Baird, as trustee, under two deeds of trust, of lots 2 and 3, in block 24, of Smith's subdivision, etc., in Chicago.

The deeds of trust were dated May 20, 1875, and were given to secure, the one embracing lot 2, \$2500, and the other, embracing lot 3, \$3000, due in five years, with semi-annual interest from date. It was provided in the deeds of trust, that on twenty days' default in the payment of interest it should be lawful for the legal holders of the notes thereby secured to declare the principal sum due, and require the trustee to make sale, etc. In May, 1877, Baird, the trustee, advertised the property for sale under the trust deed, averring in the notice that the sale was on account of the default in the payment of the May and November interest for the year 1876, and the election of the legal holder of the note to declare the principal due. On May 24, 1877, appellant was duly adjudged to be

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insane by the county court of Kane county, and committed to the State insane hospital, where she remained several months, when she was permitted to be taken away by her brother, who was a physician, but she was not discharged as being restored. The bill alleged that she was not in fact restored to sanity until about the time of filing the same.

It is also alleged, that in the latter part of the year 1876 Baird was the general financial agent of the insurance company in Chicago, and that possession of the property described in the trust deed, and leases thereof, were turned over to meet the interest, and that on January 10, 1877, appellant paid Baird \$100 to be so applied. It is also alleged, that Baird wrote the company, requesting it to send him the trust deeds and notes, but without instructions as to any action to be taken; that the company, the legal holder of said notes, never declared the principal of the debt due, nor required the trustee to advertise or sell the property.

The sale was made to Aaron C. Goodman by Baird. Goodman was the president of the insurance company, and took and held the title for the company. In 1881 Goodman sold the property to Baldwin for \$8500, and in 1882 Baldwin sold the property to Hosmer for \$11,000, no improvements having been put upon the premises to increase its value.

The bill prayed that the deeds be set aside, the redemption be allowed, etc., and that if either the deed to Baldwin or Hosmer should be held valid as against complainant, the insurance company might be decreed to pay her the present value of the property, less the amount due on the trust deed. The grounds for relief may be summarized: First, that complainant was insane at the time of the trustee's sale, and continued so until a few months before the filing of the bill; second, that the trustee accepted the \$100 on the interest due in May, 1876, and an assignment of the leases of the property, and that the rents, properly collected, would have paid interest and taxes; and third, that the sale was for an inadequate price.

Statement of the case.

On April 11, 1889, appellant, by leave, amended her bill, alleging, on information and belief, that she was insane at the time she executed the trust deeds, and had been for three years prior thereto, and so continued until shortly before the filing of the original bill.

The answers of Baldwin and Hosmer set up the defense that they were innocent purchasers for value. The other defendants denied all knowledge of insanity, denied the assignment of leases, or that rent could have been collected sufficient to pay interest and taxes, or that the property was sold for an inadequate price. All of the answers alleged that complainant was restored to sanity several years before the filing of her bill, and that she was guilty of *laches*, etc.

On the hearing, after appellant's solicitor had examined thirteen witnesses, eight of whom testified either to insanity at particular periods, or to facts and circumstances tending, as it was claimed, to show insanity, and had commenced to examine the fourteenth, the court said: "I want to ask you how many witnesses you expect to call on this line of examination. I am about tired. You have examined, I think, nine witnesses on the question of her sanity, all of them from Kane county, and all have testified to conversations they had with her, and in very few instances, indeed, have there been any particular instances or facts that could have gone to a jury or that could go before a court. Now, the rule is, three experts, and I do not want to examine every one Mrs. Green knew in Kane county." Counsel replied that the witnesses were not called as experts, but to prove facts and circumstances which indicated insanity. The court replied: "It don't throw any light on this case, so far as I am concerned, to call so many. Defendants' counsel say they are willing to be limited in number. You may go on with this witness. I think that will be enough, and I will limit them to the number." The witness then on the stand was withdrawn, and another called and examined. Three other witnesses were permitted to be examined

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to show her condition in 1881, down to the time of filing her bill. Counsel then offered other witnesses to prove the insanity of Mrs. Green, or facts and circumstances tending to establish the same, stating that eighteen others were present who were of importance as witnesses, and by whom such facts could be established. But the court peremptorily declined to permit any of them to be examined, upon the ground that a sufficient number had already been called.

A general decree was entered dismissing the bill for want of equity, and from that decree this appeal is prosecuted.

Mr. W. P. BLACK, Mr. F. A. JOHNSON, and Mr. J. N. BARKER, for the appellant:

The court erred in limiting the number of witnesses, without prior notice to complainant.

Mr. L. H. BOUTELL, for the appellees:

Limiting the number of witnesses to a given point was within the discretion of the court. 2 Phillips on Evidence, (C. & H.'s notes,) p. 396, note 324; *Anthony v. Smith*, 4 Bosw. 508; *Gray v. St. John*, 35 Ill. 222; *Mueller v. Rebhan*, 94 id. 151; *Bissell v. Cornell*, 24 Wend. 357; *Bunnell v. Butler*, 23 Conn. 69; *Fraser v. Jennison*, 42 Mich. 423.

Messrs. WILSON & MOORE, for the appellee Hosmer.

Mr. WILLIAM ELLIOTT FURNESS, for the appellee Baldwin.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

We are of opinion that a single point, only, is presented by this record which we can properly consider. One of the important questions involved at the hearing was, whether at the time of the execution of the trust deeds, and the subsequent sale thereunder, and from thence to shortly before the filing of the original bill, appellant had been and was insane. It is substantially conceded, and if it was not it is clearly manifest,

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that the issue of insanity, and whether the complainant was thereby excused from the delay in bringing her bill, or whether she was guilty of *laches* therein, was of controlling importance.

The law presumes the fact of sanity, and hence the burthen is cast upon the party alleging insanity, to establish it by a preponderance of proof. No rule can be formulated as to the *quantum* of evidence necessary to establish insanity, otherwise than that it must be sufficient to overcome the legal presumption of sanity, and to overbalance the testimony tending to sustain such presumption. This preponderance of evidence necessary to satisfy the judicial mind, does not, as a matter of course, depend upon the number of witnesses testifying on either side, but when all are apparently possessed of the same means of knowledge, and are equally intelligent and credible, the greater number must generally prevail. The trial court must, of necessity, exercise discretion as to the number of witnesses to prove a given fact that is not disputed, or that is merely collateral to the main issue, depending very much upon the nature and subject matter of the inquiry. Familiar illustrations of cases in which the discretion could not be exercised, where the inquiry is single, as, in cases of right of way, the grant of a prescriptive right, the proof of a custom, or the identity of persons or property, which are disputed, will readily occur to any one. The phases of insanity, and the facts and circumstances which may tend to establish it and are proper for consideration, are so numerous and varied that a great number of witnesses may be required to determine the fact in issue; and it is found that persons of equal intelligence differ in opinion as to the inference to be drawn from such facts and circumstances. In such cases great latitude has always been allowed, and should prevail. No reason can be perceived why the same rule might not be applied to any single collateral fact that would be applied to such collateral fact in any other inquiry. It must be apparent that the limitation of witnesses, in such cases, to an equal number on each side,

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as was here done, even supposing they were of equal credit and had equal means of knowledge, would be to defeat the party holding the affirmative of the issue.

The court may undoubtedly limit the number of witnesses called as experts, and in some cases for the purposes of impeachment. *Fraser v. Jennison*, 42 Mich. 233; *Bunnell v. Butler*, 23 Conn. 69; *Bissel v. Cornell*, 24 Wend. 357; 2 Phillips on Evidence, (Cowen & Hill's notes,) 396, note 324. It should, however, be understood, that in such cases the exercise of the discretion must be reasonable. The court may not arbitrarily determine the number of witnesses that may testify in such cases. In 1 Wharton on Evidence, sec. 505, the rule is thus stated: "A trial might be mischievously delayed if a party were permitted to call all the witnesses he chooses to prove any one particular relevant point, and, consequently, when such point appears to the court to be satisfactorily established, the further calling of witnesses to prove it may be stopped, subject, however, to the right to recall, should the point be subsequently disputed." So in *Mueller v. Rebhan*, 94 Ill. 142, and in *Gray v. St. John*, 35 id. 222, the rule is laid down by this court; that where a particular fact is not controverted, or is conceded, the trial court may rightfully limit the number of witnesses called to establish such fact. Best on Evidence, secs. 47, 48, 596.

The main fact in issue—that is, as to the sanity of the complainant,—was disputed, both in the answer and by proof, and it seems clear from the remarks of the court, that at the time he made the order limiting the complainant to nine witnesses, he was not satisfied that the fact of insanity was established. Moreover, if the power of the trial court to limit the number of witnesses, as here exercised, existed, which can not be conceded, it should have been done at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as might be deemed most important. This would have the merit, at least, of placing the parties on an

Syllabus.

equal footing. By the course pursued, the complainant was practically deprived of this privilege, except as to the last witness.

While the court might, as before said, in the exercise of a sound discretion, limit the number of witnesses called to prove any collateral fact, or any fact conceded, or which the court might regard as established, we are of opinion that the court erred in limiting the witnesses to be called by complainant upon this issue,—and especially must this be so where the order was made after the designated number of witnesses had been examined by her.

We do not deem it proper to consider the other points in the case, as it must be again heard, and therefore refrain from the expression of opinion thereon.

For the error indicated, the decree of the circuit court will be reversed, and the cause remanded.

Decree reversed.

ARTHUR HOSMER v. THE HUNT DRAINAGE DISTRICT,

and

WILLIAM P. HAMMOND v. THE HUNT DRAINAGE DISTRICT.

Filed at Springfield November 1, 1890.

1. TAXES—SPECIAL ASSESSMENTS—*forfeited lands—penalty—section 129 of the Revenue law construed.* Section 129 of the Revenue law, providing for adding twenty-five per cent to the taxes on forfeited lands, and for the collection thereof, is a penal statute, and should not be held to embrace property not clearly within its terms. It is confined to general taxes, and has no application to special assessments.

2. There is no authority of law for adding twenty-five per cent to special assessments on lands forfeited to the State. Such penalty applies only to the ordinary taxes, and it is error to include such penalty in a judgment against delinquent lands for unpaid special assessments.

Brief for the Appellants.

APPEAL from the County Court of Hancock county; the Hon. JOHN W. MARSH, Judge, presiding.

Mr. W. C. HOOKER, Mr. G. EDMUNDS, and Mr. W. H. MANIER, for the appellants:

The amount carried forward by the county clerk from the forfeit record of 1889 to the current tax or assessment of 1889, with interest at twenty-five per cent, and costs, was so carried without authority of law, and created no charge against the lands.

Special assessments for drainage purposes, under the Drainage law, are not subject to be carried forward, with interest at twenty-five per cent, under section 129, chapter 120, of the Revised Statutes, and are not chargeable with one per cent per month after May 1, under section 177 of said chapter, and no judgment should have been rendered therefor. *Riverside Co. v. Howell*, 113 Ill. 256; *Owners of Lands v. People*, id. 296; *Chambers v. People*, id. 520; *Harlem v. Eastman*, 119 id. 22; *Drake v. Ogden*, 128 id. 603; *People v. Gale*, 93 id. 127; *Nail Co. v. People*, 98 id. 405; *Stampsoski v. Stanley*, 109 id. 210.

As to some of the lands, it will be seen that in carrying forward forfeited taxes, interest at twenty-five per cent is carried forward, and accumulated about seven years, until the said interest far exceeds the tax—assessments. This court, in *Murphy v. People*, 120 Ill. 234, say the interest after May 1, under section 171, chapter 120, of the Revised Statutes, does not apply to special assessments. If that ruling is correct, upon the same principle the court must in this case hold, the twenty-five per cent on forfeiture does not apply to such assessments. Both are, no doubt, intended as penalties for non-payment, and both should stand or both fall. No reason or principle applies to one that does not to the other.

An examination as to benefits would show, as appellants offered to show, that the land is assessed far more than bene-

Brief for the Appellee.

fited, and much of it to confiscation. But for our being deprived of settling a bill of exceptions in 1887, the record would show that fact.

The assessment of \$520 to the north-east quarter, and \$640 to the north-west quarter of section 29, town 3, range 9, by the commissioners, under order of November 5, 1888, and confirmed January 7, 1889, was without a shadow of authority, and void.

MR. DAVID MACK, and MR. WILLIAM N. GROVER, for the appellee :

Upon the two tax cases we present the following views to the court :

First—That objections to the assessments can not be made on application for judgment for taxes. *Blake v. People*, 109 Ill. 520, and cases there cited; *People v. Brislin*, 80 id. 422; *Lehmer v. People ex rel.* 80 id. 601; *People v. Railway Co.* 83 id. 154; *Gage v. Parker*, 103 id. 528; *Andrews v. People*, 84 id. 28.

Second—But if this were not so, the assessments, for reasons before given, were valid, and ought to be sustained.

Third—There is then left for consideration the questions involved in the methods of carrying forward the taxes from year to year, and the computation of interest, penalties, etc. If any errors exist here, it devolves upon the objectors to show them.

Fourth—The rule that we feel at liberty to invoke in these cases seems to be quite clearly laid down in the case of *People v. Gale*, 93 Ill. 127, and followed in the case of *People v. Smith*, 94 Ill. 226.

If the words "special assessments" are held to mean the same as "tax" or "taxes," following the definition adopted by this court in *Gauen v. Drainage District*, 131 Ill. 446, it would seem to follow that the twenty-five per cent provided for by

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sections 129 and 229 of the general Revenue law should be added to the back assessments as a part of the back tax.

In the case of *Murphy v. People*, 120 Ill. 242, the court lay stress upon the fact that the one per cent a month penalty after May shall be paid into the county treasury for county purposes, and say: "Surely, the legislature could not have intended to raise a fund by special assessments, to be placed in the county treasury, to be used for county purposes." The weight of this objection does not fall upon the twenty-five per cent, which goes, with the principal of the assessment, to the use of the drainage district.

It is manifest, that as to the tracts of land now before the court, claimed by Hosmer and Hammond, the twenty-five per cent was added to the back assessments as if they were back taxes, and if this is held to be error, the judgments must be reversed. We are not aware that the special assessments were charged with the one per cent from the first of May, or that any other errors of computation will be charged to have been made. If so, it will devolve upon the opposite counsel to show them, all presumptions being in favor of the judgment.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an application, May 5, 1890, to the county court of Hancock county, for judgment against certain lands for taxes, special assessments, interest and costs, for the year 1889 and prior years. Arthur Hosmer and William P. Hammond appeared, and filed objections to the rendition of judgment against certain lands claimed by them. The court overruled the objections, and rendered judgment as asked for by the county collector.

It appears from the record, that in addition to the ordinary State and county taxes, certain special assessments had been levied on the lands to make improvements in Hunt Drainage District, and in 1889, and perhaps other years, the lands had

Opinion of the Court.

been forfeited to the State for the non-payment of the assessments. In extending the taxes for the year 1889, the county clerk, under what he supposed to be the requirements of section 129 of the Revenue law of 1879, added twenty-five per cent to the amount of the back assessments, as he would have done if they had been general taxes, and this amount was included in the judgment of the county court, rendered at the May term, 1890, and the question presented is, whether such interest was properly added to the assessments.

Section 129 of the Revenue law is as follows: "In all cases where any real property has heretofore been or may hereafter be forfeited to the State for taxes, it shall be the duty of the clerk, when he is making up the amount of tax due on such real property for the current year, to add the amount of back tax, interest, penalty and printer's fees remaining due on such real property, with one year's interest at ten per cent, on all taxes heretofore forfeited, and twenty-five per cent on all taxes hereafter levied and forfeited, on the amount of tax due, to the tax of the current year, and the aggregate amount so added together shall be collected in like manner as the tax on other real property for that year may be collected." Laws of 1879, p. 252.

It will be observed that this section of the statute, providing for a penalty of twenty-five per cent where property has been forfeited to the State, does not mention assessments, but only taxes, and unless assessments are taxes, within the meaning of the statute, there was no authority for adding twenty-five per cent to the assessments in question.

In *Mix v. Ross*, 57 Ill. 124, a question somewhat similar arose, and it was there said: "There is a plain distinction between taxes, which are burdens or charges imposed upon persons or property to raise money for public purposes, and assessments for city or village improvements, which are not regarded as burdens, but as an equivalent or compensation for the enhanced value which the property of the person as-

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sessed has derived from the improvement." It is true, under our statute, assessments, after they have been legally made upon real property, are collected in the same manner as taxes; but while this may be the case, we do not think, where the words "taxes" and "assessments" are used in the statute, they can be regarded as convertible terms. The statute in question is a penal statute, and it should not be held to embrace property not clearly within its terms. If it had been within the intention of the legislature to include assessments, we think that term would have been used, and as it was not, we do not feel inclined to hold that something was included which was not mentioned.

Section 177, which follows section 129 in the amendment of 1879, provides that real estate upon which taxes remain due and unpaid on the 10th day of March, annually, shall be deemed delinquent, and such due and unpaid taxes shall bear interest after the first day of May, at the rate of one per cent per month, until paid or forfeited. In *Murphy v. The People*, 120 Ill. 242, we held that the word "taxes," as used in this section of the statute, did not include special assessments. If the word "taxes" in this section did not include assessments, as was held; we perceive no ground upon which it can be held that the word "taxes" in the preceding section was broad enough to embrace assessments. The same construction placed on the word "taxes" in one section should be given the same word in the other.

From what has been said, it follows that the judgment rendered against the lands of Arthur Hosmer and William P. Hammond was erroneous in the respect stated, and for that reason it will be reversed, and the cause remanded.

Judgment reversed.

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83a	1239
134	323
183	346

THE CHICAGO, BURLINGTON AND QUINCY RAILROAD COMPANY

v.

THE CITY OF CHICAGO.

Filed at Ottawa October 31, 1890.

CONTRACT—*use of street for railway purposes—agreement by company to indemnify the city against liability to individuals.* A railway company accepted the provisions of a city ordinance giving it permission to lay its tracks along a certain street on the condition it should pay the city for the erection of a viaduct over the street, which would be made necessary by the construction and operation of the road, and should indemnify the city from any and all legal damages, judgments, decrees, and costs and expenses of the same, which it might suffer, or which might be recovered or obtained against said city for or by reason of the granting of such privileges and authority, or resulting from the passage of the ordinance, or any matter or thing connected therewith. The city built the viaduct, and the owner of lots recovered \$10,000 damages against the city for injury to the same by destroying the means of ingress and egress to and from the lots: *Held*, that the railway company was liable to the city for the amount so recovered for the damage resulting to the property owner by reason of the construction of the viaduct.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. A. N. WATERMAN, Judge, presiding.

This was a suit instituted by the city of Chicago against the Chicago, Burlington and Quincy Railroad Company, to recover upon an alleged contract of indemnity entered into by the company. The grounds of the action are set forth in the opinion.

MESSRS. DEXTER, HERRICK & ALLEN, for the appellant.

MR. FRANCIS ADAMS, for the appellee.

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MR. JUSTICE WILKIN delivered the opinion of the Court :

On the 8th day of April, 1884, Nathan Mears brought suit against the city of Chicago, in the Superior Court, alleging in his declaration that he was the owner of certain real estate in said city, to which Polk street furnished a convenient means of ingress and egress, and that the city had caused to be constructed upon and along the said street, and had maintained thereon, an embankment, obstructing such ingress and egress by means of the said street, thereby damaging said property. On a trial he obtained a judgment for \$10,000, and costs of suit, which the city afterward paid. This action is brought to recover the amount of that judgment. In the trial court plaintiff had judgment for \$12,534, and costs, which was affirmed by the Appellate Court. Appellant now brings the record to this court.

The liability of appellant is based on the following ordinance passed by the city council of the city of Chicago, December 20, 1880 :

“An ordinance granting permission to the Chicago, Burlington and Quincy Railroad Company to construct tracks between West Harrison and West Twelfth streets.

“*Be it ordained by the City Council of the City of Chicago :*

“SECTION 1. That permission and authority be and are hereby granted unto the Chicago, Burlington and Quincy Railroad Company to lay down, maintain and operate one or more railroad tracks on the property owned or hereafter to be acquired by them, between West Harrison street on the north and West Twelfth street on the south, and the tracks of the Pittsburgh, Fort Wayne and Chicago Railway Company on the east and Canal street on the west, and for that purpose to extend such tracks across intervening streets, together with all such turn-outs, switches, turn-tables and other structures as may be deemed necessary to accommodate the business to be done over said tracks.

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"Sec. 2. Said railroad company shall also have the right to run its trains from its present depot grounds on Sixteenth street, over the tracks of the Pittsburgh, Fort Wayne and Chicago Railway Company located on and adjoining Beach street and Stewart avenue, to and on to the depot grounds mentioned in said section 1, and to the depot grounds of said last named company, situated between Madison and Harrison streets; and if, at any time hereafter, the facilities offered by the Pittsburgh, Fort Wayne and Chicago Railway Company for such track service shall be deemed inadequate to accommodate the business of the companies using the same, and the Chicago, Burlington and Quincy Railroad Company shall purchase or lease other right of way near to or adjoining said tracks on the west, between Sixteenth and Twelfth streets, permission is hereby granted to said last named company to lay one or more tracks on the same, and to cross the intervening streets.

"Sec. 3. The permission and authority hereby granted are upon the express conditions that the said railroad company shall pay, or cause to be paid, to the city of Chicago, the cost and expense of constructing and erecting a new viaduct on Polk street, over the railroad tracks crossing said street, between Canal street and the Polk street bridge, together with all proper lateral and other approaches necessary thereto, the money necessary therefor to be paid by said company, as aforesaid, as fast as required by the city in paying for the construction and erection of said viaduct and the lateral and other approaches thereto, and shall maintain and keep the same in repair without expense or cost to the city of Chicago, such construction, maintaining and keeping in repair to be done pursuant to the direction of the city council, under the supervision of the commissioner of public works. And the permission and authority hereby granted are upon the further express condition, that the said railroad company shall pay to the city of Chicago the expense of constructing, erecting, maintaining and keeping in repair viaducts over any of its said

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tracks on any street or streets crossed by its tracks, except said Polk street above provided for, with proper approaches thereto, as the city council may, from time to time, require: *Provided, however, that when any such viaduct, except said Polk street viaduct above provided for, can not be constructed across the tracks of said railroad company without crossing the track or tracks of some other railroad company or companies, the said Chicago, Burlington and Quincy Railroad Company shall only be obliged to join such other railroad company or companies in paying the expense of erecting, constructing, maintaining and keeping in repair such viaduct and approaches, and to pay its fair proportion of such expense, as between it and such other company or companies; and if such other railroad company or companies shall not join said Chicago, Burlington and Quincy Railroad Company in paying said expense, then, when the proportion of said other company or companies shall be otherwise provided, the said Chicago, Burlington and Quincy Railroad Company shall pay what would be its fair proportion of said expense in case such other company or companies should join with it in the payment of said expense, as aforesaid,—said viaduct or viaducts, and approaches thereto, to be constructed according to the plans and specifications of the department of public works. Said Chicago, Burlington and Quincy Railroad Company shall furnish sufficient outlets for the private property bounded by Harrison, Twelfth, Beach streets, and the south branch of the Chicago river.*

“Sec. 4. The permission and authority hereby granted are upon the further express condition, that the said railroad company shall and will forever indemnify and save harmless the city of Chicago against and from any and all legal damages, judgments, decrees and costs, and expenses of the same, which it may suffer, or which may be recovered or obtained against said city, for or by reason of the granting of such privileges and authority, or for or by reason of, or growing out of or

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resulting from, the passage of this ordinance, or any matter or thing connected therewith, or with the exercise by said company of the privileges hereby granted, or from any act or acts of said company under or by virtue of the provisions of this ordinance.

"Sec. 5. This ordinance shall take effect and be in force from and after its passage."

At the meeting of the council next after the passage of this ordinance, held on the 27th of December, 1880, an order for the construction of a viaduct, and approaches thereto, on Polk street, was presented, and referred to a committee on streets and alleys. March 2, 1881, on a report of that committee, the order was passed, and a viaduct on Polk street was constructed in pursuance thereof. In making the approaches to that viaduct, the embankment for which Mears recovered damages from the city, was made.

The only question presented for our decision is, can the city, under the provisions of the ordinance of December 20, demand from appellant indemnity against these damages, under the provisions of section 4 of that ordinance. If it can be successfully maintained that the judgment obtained by Mears against the city was recovered for damages growing out of or resulting from the passage of said ordinance, then, by the express terms of that section, appellant is bound to indemnify the city against such judgment.

If there is any uncertainty in the language of section 4, it is the result of an effort to make it exceedingly comprehensive and definite, by using more words than were necessary. Its plain meaning, when applied to the facts of this case, is, that the railroad company shall indemnify the city against all legal damages recovered against it by reason of its granting the privileges mentioned in the former sections.

We do not regard the words, "or any matter or thing connected therewith," as of importance in the decision of this case, though much of the argument is devoted to a discussion of their meaning. Especially is it unimportant what the word

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"therewith" refers to. Whether we say, "from the ordinance," or "from the passage of the ordinance," the meaning here is the same, viz., the granting "permission and authority" by the first and second sections. It is not necessary that the damages recovered from the city should be the direct and immediate consequence of the granting of that permission, to make the railroad company liable. If they are such as reasonably grow out of or result therefrom, the company is responsible. Therefore, although the Polk street viaduct was built by the city under an independent order, and although the ordinance of December 20 does not, in terms, require it to be built, still, if it sufficiently appears that the parties contemplated its erection as one of the results of the passage of the ordinance, the liability must be held to attach. Whatever else they may have contemplated as damages which might result from the passage of the ordinance, for which the city would be liable, it is certainly clear that they did understand that one of the results,—one of the things growing out of it,—would be the building of a Polk street viaduct. By section 3 the company is required to pay, or cause to be paid, to the city, the cost and expense of constructing and erecting such a viaduct, and if it be conceded that this section created no obligation on the part of the city to cause it to be built, still, it must be admitted that it does show that both the city and railroad company contemplated that it would be built, as a result of the permission granted.

While it is true, that by reason of the tracks of other railroads crossing this street, and the running of trains thereon, there was, at the time of the passage of the ordinance, more or less of necessity for a viaduct over it, it is not true, as insisted on behalf of appellant, that the one built was not made necessary by the permission to appellant to put additional tracks and run additional trains across it. The permission and authority, by this ordinance, to appellant, to further obstruct said street by tracks and trains, made it necessary for

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the city to make the viaduct, and both parties recognized that fact by section 3.

In our opinion it is impossible to read this record without arriving at the conclusion that the building of the viaduct followed as one of the contemplated results of the act of the city council in permitting appellant to construct its tracks and move its trains across Polk street.

It is not pretended that the elevation of the grade of that street, for which Mears recovered judgment, was not made necessary by the building of the viaduct; but it is insisted that this construction will, or may, result in injustice to appellant should the city council require viaducts to be built over other streets, as provided in section 3, and by so doing it should become necessary to cross other tracks than those of appellant, the argument being, that while in such case, by the terms of the ordinance, appellant would only be bound to pay its proportionate part of the cost of erecting the viaduct, this holding would make it liable for the entire damages to property holders resulting from such erection. If it should, in such case, turn out that the city held no indemnity contracts from the owners of other tracks, appellant might be held so liable, and if it should, as between it and such other owners the result would certainly be unjust. Still, that possible result affords no sufficient reason for rejecting the reasonable, and, as we think, obvious, construction of the ordinance, as between appellant and the city. Nor do we find anything in the prior action of the city council, shown by the record, inconsistent with this holding.

The rules of law laid down by counsel for appellant for the construction of ordinances, statutes and contracts, are not questioned, but so far as they are properly applicable to this case they sustain our conclusion.

The judgments of the circuit and Appellate Courts will be affirmed.

Judgment affirmed.

Syllabus.

COMRS. OF MASON AND TAZEWELL SPECIAL DRAINAGE DISTRICT

*v.*WILLIAM L. GRIFFIN *et al.**Filed at Springfield November 1, 1890.*

1. JURISDICTION—*of the person—appearance—waiver.* If there be no sufficient service of process on a petition for a common law writ of certiorari, the appearance of the defendant without making objection is a waiver of all defects of jurisdiction of his person, and the objection comes too late on motion in arrest of judgment.

2. SAME—*defendant sued out of his own county—matter of jurisdiction to be pleaded.* Section 2 of the Practice act, which makes it unlawful for any plaintiff in a transitory action to sue any defendant out of the county where the latter resides or may be found, gives the defendant a privilege, merely, of being sued in the county where he resides or may be found, to avail of which he must do so in apt time, by plea to the jurisdiction, or he will be deemed to have waived it.

3. SAME—*drainage district—residence—for the purposes of suit.* A drainage or quasi municipal corporation having within its boundaries territory in two counties, must be deemed to be existing and located, for all purposes of jurisdiction, in every part of its territory; and the same is true of its corporate authorities, so that an action, even if local, may be brought against the corporation in either county.

4. CERTIORARI—*as a common law remedy—in force in this State.* The common law remedy of certiorari is adopted and in force in this State, and any court exercising general common law jurisdiction has, unless expressly forbidden to do so by statute, an inherent authority to issue the writ.

5. SAME—*not a writ of right.* The common law writ of certiorari is not a writ of right, but issues only upon proper application and proper cause shown.

6. SAME—*when the writ may issue.* The writ of certiorari may be awarded to all inferior tribunals and jurisdictions, where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing the proceedings.

7. SAME—*purpose of the writ—of the trial and judgment.* The purpose of the writ is to have the entire record of the inferior tribunal brought before the court in which the proceedings are sought to be reviewed, to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the

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e189 1458

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e214 89

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Syllabus.

essential requirements of the law. The trial is solely by inspection of the record, and if that shows the want of jurisdiction, or illegality, the proper judgment is that the record be quashed.

8. *SAME—to what inferior tribunals the writ may issue.* The general rule seems to be, that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. But it is not essential that the proceedings shall be strictly and technically "judicial," in the sense in which that word is used when applied to courts of justice. It is sufficient if they are *quasi* judicial.

9. *CORPORATIONS—legality of organization—exercise of assumed powers—by what remedies to be questioned—former decisions.* In several cases in this court there are expressions from which it might be inferred that a *quo warranto* is the only mode of testing the legality of the formation of an existing *de facto* corporation; but that question did not arise and was not decided in them.

10. In *Lees v. Drainage Commissioners*, 125 Ill. 47, it is held that the writ of certiorari does not lie to determine whether a corporation has a legal existence, and that the validity of its organization can be questioned only by *quo warranto*. In that case, the corporate existence itself of a *quasi* municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto* and *de jure*, extending the boundaries of the district.

11. No good reason is perceived why a municipal corporation which has exceeded its jurisdiction and has proceeded illegally, may not be proceeded against by *quo warranto*, by *scire facias*, or by the common law writ of certiorari, indifferently, as the one or the other may afford a proper and sufficient remedy.

12. *DRAINAGE LAW—enlarging drainage district—conditions to the exercise of the power.* Before the commissioners of a drainage district are authorized by law to make an order annexing other lands thereto, they must determine, from the evidence, whether the requisite number of adult owners have signed the petition for annexation, and whether the signers are the owners of the requisite proportions of the lands embraced within the district, and whether the lands sought to be annexed are involved in the same system of drainage, and require for outlets the drains of the district.

13. *SAME—notice—of enlargement of drainage district.* Section 42 of the Drainage act of 1885, vesting the commissioners of a drainage district with power to enlarge the boundaries of their district, fails to prescribe the mode of procedure, or the notice to be given to the owners of the lands sought to be annexed. The court holds, however, that

 Brief for the Appellants.

the same notice required in the formation of an original district must be given of the proceeding for such enlargement, and that without such notice the order of annexation is void, and will be quashed on certiorari.

14. SAME—*defective notice—who may avail of it—in the case of several land owners.* Although a land owner may waive a want of sufficient notice in a proceeding to annex additional territory to an already existing drainage district, by appearing at the time and place appointed for hearing objections, so far as he is concerned, yet he has the right to have the annexation valid and binding on all the land owners or on none, and therefore he may take advantage of the defective notice, unless all persons affected by the order appeared, and thereby conferred jurisdiction. In such case, the commissioners must acquire jurisdiction of all the land owners, and of all the lands within the territory proposed to be annexed, before they may lawfully act. If the order of annexation is void as to some of the lands and owners, it is so *in toto*.

APPEAL from the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Tazewell county; the Hon. N. W. GREEN, Judge, presiding.

MESSRS. WALLACE & PRETTYMAN, for the appellants:

A corporation organized, and a defendant, under a statute, must be sued in the county where its principal office is kept, and where the cause of action arose. *Parke v. Insurance Co.* 44 Pa. St. 422; *Safford v. Insurance Co.* 88 Ill. 296; Rev. Stat. chap. 110, sec. 2.

If assessments exceed the benefits, the remedy is by appeal. *Commissioners v. Kelsey*, 120 Ill. 482; *Moore v. People*, 106 id. 377; *Mascall v. Drainage Comrs.* 122 id. 620.

Certiorari does not bring up evidence not in the record. *Railway Co. v. Whipple*, 22 Ill. 108; *Booth v. Barnes*, 1 Mich. 37; *Doolittle v. Railroad Co.* 14 Ill. 383; *Railroad Co. v. Fell*, 22 id. 336; *Donahue v. Will County*, 100 id. 102.

The appearance of the land owners gave the commissioners jurisdiction. *State v. Jersey City*, 12 Vroom, 493; *State v. Elizabeth*, 13 id. 58; *Huston v. Clark*, 112 Ill. 350; *Kedzie v. Park Comrs.* 114 id. 284.

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Certiorari does not lie to test the organization of a drainage district. It can only be done by an information in the nature of a *quo warranto*. *Lees v. Drainage Comrs.* 125 Ill. 47; *Renwick v. Hall*, 84 id. 162; *Osborn v. People*, 103 id. 224; *Evans v. Lewis*, 121 id. 478; *Keigwin v. Drainage Comrs.* 115 id. 347; *Blake v. People*, 109 id. 504; *People ex rel. v. Newberry*, 87 id. 41; *Trumbo v. People*, 75 id. 561; *Baker v. Admr. of Backus*, 32 id. 79; *People ex rel. v. Board of Education*, 101 id. 308; *Hinze v. People*, 92 id. 406; *Samuels v. Drainage Comrs.* 125 id. 540.

There is no difference in the manner or way by which the legality of enlarging the boundaries of a district by annexing lands can be tested, and the organization of the district in the first instance.

The only object of a writ or notice is to bring the party before the court or tribunal, and if he voluntarily appears and submits himself to the jurisdiction, it matters not whether there is or is not any writ or notice, or whether the same is or is not void. *Wasson v. Cone*, 86 Ill. 46; *Huston v. Clark*, 112 id. 350; *Miles v. Goodwin*, 35 id. 53; *Baldwin v. Murphy*, 82 id. 485.

The record shows that every one of the appellees who sued out this writ of certiorari appeared before the commissioners, either in person or by their attorney, and were heard at the time the petition for the enlargement was presented and the proceeding had and the enlargement made, and having submitted themselves to the jurisdiction, (if such is the proper term to use,) they can not be heard to complain of want of notice.

Mr. JAMES H. SEDGWICK, for the appellees:

There are two classes of cases in which, according to the previous decisions of this court, a common law writ of certiorari will lie: First, whenever it is shown that the inferior court or jurisdiction has exceeded its jurisdiction; and second,

Brief for the Appellees.

whenever it is shown that the inferior court or jurisdiction has proceeded illegally, and no appeal or writ of error will lie. *Hyslop v. Finch*, 99 Ill. 173.

The method of directly reviewing the proceedings of such inferior jurisdictions afforded by our law, where, as in this case, no appeal is allowed, is either by writ of error or certiorari at common law.

Whenever a new jurisdiction is created by act of parliament, and the court or judge that exercises this jurisdiction acts as a court of record, according to the course of the common law a writ of error lies on their judgments. But if they act in a summary way, or in a new course different from the common law, a writ of error will not lie, but a certiorari. *Haines v. People*, 97 Ill. 166.

There is a wide difference between attacking the organization of a *quasi* municipal body, and in questioning orders made concerning or by it, that effect a change of its boundaries. While in the first case *quo warranto* is the only remedy, in the second case certiorari is proper. *Miller v. Trustees of Schools*, 88 Ill. 27.

The case of *Lees v. Drainage Comrs.* 125 Ill. 47, holds that certiorari will not lie to the commissioners on the order giving them existence as an artificial person, and the proceedings in the original formation of the district.

In *People v. Whitcomb*, 55 Ill. 172, it is held that *quo warranto* is not the proper remedy to test the right of a city to extend its boundaries; that such writ is generally employed to try the right of a person's claim to an office,—not whether his official acts should be confined to a particular locality.

In a proceeding by *quo warranto* under our statute, against these commissioners, in such a case as this, there could be no judgment of ouster or setting aside their non-jurisdictional order complained of,—only a fine and costs. This would not put our lands *in statu quo*. Rev. Stat. chap. 112, sec. 6.

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This statute has not taken away the old common law right of the citizen to have such proceedings reviewed on certiorari.

If a statute gives a remedy in the affirmative, without a negative expressed or implied, for a matter which was actionable at common law, the party may proceed at common law, as well as upon the statute, for that does not take away the common law remedy. Sedgwick on Stat. and Const. Law, (2d ed.) p. 343, 100 n.

To issue the writ of certiorari at common law is a high prerogative of the court, that can not be taken away by implication,—only by express words. *Commonwealth v. Balph*, 111 Pa. 365; *People v. Williamson*, 13 Ill. 662.

The statutory remedy by *quo warranto* is a people's remedy for a public injury done the State in usurping franchises and powers not granted, and is not for the protection of private rights and the redress of private injuries, such as the putting of a general lien for past assessments, by a non-jurisdictional order, on the lands of the citizens. *People v. Railway Co.* 88 Ill. 538; *People v. Koerner*, 21 id. 65.

The remedy by *quo warranto* can only be resorted to at the discretion of the Attorney General, or the State's attorney of the proper county. Rev. Stat. chap. 112, sec. 1.

Confining the citizen to such a remedy for injuries to his private rights, is in violation of section 19, article 2, of our State constitution, and of section 1, article 14, of the United States constitution.

The point that certiorari will not lie in review of the order and proceedings complained of by us, was not made by appellants in the circuit court.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a common law writ of *certiorari*, brought to review certain proceedings of the commissioners of the Mason and Tazewell Special Drainage District. Said district was organ-

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ized in the year 1882, under the provisions of the act entitled "An Act to provide for the organization of drainage districts, and to provide for the construction, maintenance and repair of drains and ditches by special assessment on the property benefited thereby," approved May 29, 1879, and originally embraced 42,000 acres of land situate in several townships in the counties of Tazewell and Maçon. After said district had been organized and had constructed its main and lateral ditches and smaller drains, and had levied and in part collected several assessments upon the lands of the district for the construction thereof, and had also incurred a heavy indebtedness for which it had issued its bonds, it was claimed that other lands adjoining the district at various points were actually involved in the same system of drainage, and that the owners of such lands depended upon and were, to some extent, availing themselves of the ditches and drains thus constructed. A petition was thereupon prepared and signed by certain of the adult owners of land in the district, praying for an enlargement of the boundaries of the district by annexing thereto the several adjacent tracts of land situated as above described. Said petition was presented to the commissioners of the district on the 10th day of January, 1887, and the proceedings whereunder were had or attempted to be had in pursuance of the provisions of section 42, of the act of June 27, 1885, entitled "An Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named," said last named act being an amendatory revision and consolidation of the act under which said district was organized and the several acts amendatory thereof. Laws of 1885, p. 77. Said proceedings resulted in an order by said commissioners enlarging the boundaries of said district in accordance with the prayer of the petition. Various of the owners of the lands thus annexed, presented to the Circuit Court of Tazewell county their petition for a *certiorari*, alleging, among other things, that the proceedings by which the

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boundaries of said district had been enlarged were irregular and without jurisdiction or lawful authority on the part of said commissioners, and praying that the record of said proceedings be brought before said court, and that said order of annexation to or extension of the boundaries of said special drainage district, and the entry thereof in the records of said district, be reversed, set aside and annulled. On said petition a writ of *certiorari* was duly issued and served, and thereupon said commissioners made return to said writ by certifying to said court the record of said proceedings. On inspection of said record, the court entered judgment quashing the same, and ordering that it be forever held for naught. Said judgment was affirmed by the Appellate Court, and an appeal has now been taken to this court.

It is urged by the appellants that the Circuit Court of Tazewell county had no jurisdiction. It is clear that no question as to its jurisdiction of the persons of the appellants can now be raised. Even if there had been no sufficient service of process, their appearance without objection was a waiver of all defects of jurisdiction over their persons, and it was too late to raise the objection for the first time, as it was raised in this case, on motion in arrest of judgment. But it is insisted that said court had no jurisdiction of the subject matter of the writ, such contention being based upon the fact that said drainage district, though comprising territory in both Tazewell and Mason counties, was organized by the County Court of Mason county, and kept its principal office and its records in that county. On this point counsel cite and seem to rely upon the provisions of the second section of the Practice Act, which makes it unlawful for any plaintiff in a transitory action, to sue any defendant out of the county where the latter resides or may be found. In view of the provisions of that section it seems to be immaterial whether said drainage district is deemed to be a resident of Mason county or not, since the statute, as has frequently been held by this court,

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gives the defendant a privilege merely of being sued in the county where he resides or may be found, and that to avail himself of such privilege, he must do so in apt time by plea to the jurisdiction, or he will be deemed to have waived it. *Drake v. Drake*, 83 Ill. 526; *T., W. & W. Ry. Co. v. Williams*, 77 id. 354; *Wallace v. Cox*, 71 id. 548; *Humphrey v. Phillips*, 57 id. 132; *Hardy v. Adams*, 48 id. 532; *Kenney v. Greer*, 13 id. 432. The jurisdiction of said court not having been challenged in the proper time or manner, the appellants can not now avail themselves of the provisions of said statute.

But if the suit is to be deemed to be local, we see no reason why it could not be as well brought in Tazewell as in Mason county. The drainage district is a municipal or *quasi* municipal corporation having within its boundaries certain defined territory, part of which is in Mason and part in Tazewell county. The corporation must be deemed to be existing and located, for all purposes of jurisdiction, in every part of its territory. The same thing may also be said of its corporate or municipal authorities, the drainage commissioners. Furthermore, the action of the commissioners in enlarging the boundaries of the district affected lands situate in Tazewell as well as lands lying in Mason county. Indeed, the greater part of the lands sought to be annexed to the district seems to be situate in Tazewell county. If then the action is local, either by reason of the locality of the drainage district or the location of the lands sought to be annexed, the jurisdiction may as properly be in the Circuit Court of Tazewell county as in the Circuit Court of Mason county. The fact that the County Court of Mason county happened to be the instrumentality through which the original organization of the district was effected, or the fact that the custodian of its records happens to be an officer residing in Mason county, ought not to have, so far as we are able to see, any controlling influence upon the question of jurisdiction. Neither of these facts makes the drainage district, its officers and records, any the less, in

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legal contemplation, a municipal corporation of and having its records and officers in Tazewell county, and subject to the jurisdiction of the courts of that county.

It is strenuously urged that *certiorari* is not the proper remedy, the contention being that the petitioners should have resorted to an information in the nature of a *quo warranto*. We need not pause to determine whether *quo warranto* would lie or not, as we know of no rule which, in this case, would make that remedy necessarily exclusive, even if it should be held to be a proper or available remedy. The only question is whether the alleged defects in the proceedings for the enlargement of the drainage district are such as can be reached and remedied by writ of *certiorari*, and this question is in no way dependent upon whether a writ of *quo warranto* might not also lie to oust the drainage commissioners of their control over the territory annexed, or to dissolve the organization of the drainage district so far as it applies to that territory.

The writ of *certiorari* is a well known common law writ, and in England the Court of King's Bench has always been in the practice of awarding it to inferior jurisdictions commanding them to send up their records for inspection. By adopting the common law, we have adopted this as a recognized legal remedy, and in this State, any court exercising general common law jurisdiction has, unless expressly forbidden to do so by statute, an inherent authority to issue it. *People v. Wilkinson*, 13 Ill. 660; *Miller v. School Trustees*, 88 id. 26; 3 Am. & Eng. Ency. of Law, tit. *Certiorari*. Neither in England nor in this State is it held to be a writ of right, but it issues, in proper cases, only upon application to the court, on proper cause shown.

We have repeatedly held that said writ may be awarded to all inferior tribunals and jurisdictions where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing their proceedings.

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Gerdes v. Champion, 108 Ill. 137; *Doolittle v. G. & C. U. R. R. Co.* 14 id. 381; *C. & R. I. R. R. Co. v. Whipple*, 22 id. 105; *C. & R. I. R. R. Co. v. Fell*, id. 333. The purpose of the writ is to have the entire record of the inferior tribunal brought before the superior court to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. The trial is solely by inspection of the record, no inquiry as to any matter not appearing by the record being permissible, and if the want of jurisdiction or illegality appears by the record, the proper judgment is that the record be quashed.

Undoubtedly, where the controversy involves the investigation of facts not appearing upon the record, *certiorari* is not the proper remedy. Thus, if in the present case, the right to have the proceedings by which the lands in question were annexed to the drainage district set aside, and the drainage commissioners ousted of the corporate authority they now claim to exercise over said lands, depended upon facts which could be established only by evidence *dehors* the record, the writ of *certiorari* would manifestly be of no avail. It may be admitted that in such case *quo warranto* would be the exclusive remedy. But here the want of jurisdiction, if it exists at all, appears upon the face of the record. If then the proceedings of the drainage commissioners enlarging the boundaries of the district constitute a subject matter which may be reviewed by *certiorari*, that must be held to be an appropriate remedy.

The general rule seems to be that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature and not ministerial or legislative. *Lock v. Loxington*, 122 Mass. 290; *State v. Mansfield*, 34 Minn. 250; *In re Wilson*, 32 id. 145; *Robinson v. Supervisors*, 16 Cal. 208; *Ex parte Fay*, 15 Pick. 243; *Stone v. Mayor, etc.* 25 Wend. 157; *Esmeralda v. District Court*, 18 Nev. 438; *Thompson v. Multnomah County*, 2 Ore. 34. But it is not essential that the proceedings should

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be strictly and technically "judicial" in the sense in which that word is used when applied to courts of justice. It is sufficient if they are what is sometimes termed "quasi judicial." The body or officers acting need not constitute a court of justice in the ordinary sense. If they are invested by the Legislature with the power to decide on the property rights of others, they act judicially in making their decision, whatever may be their public character. *Robinson v. Supervisors, supra.*

Thus, it is held that this writ lies to review the proceedings of supervisors, commissioners, city councils, etc., in opening, altering or discontinuing public streets and highways as to their legality or regularity, though not as to the question of the expediency of such improvements. 3 Am. & Eng. Ency. of Law, 65, and authorities cited in note 4. So also, in some States, it has been held, subject to the foregoing qualification, to be the proper writ to correct illegalities in the levying of taxes and local assessments by assessors, commissioners, etc., (*id.*) though in this State it has been refused where the defense of illegality could be made at the hearing of the application for judgment. *Pease v. City of Chicago*, 21 Ill. 500. The writ has also been held to lie to review the action of school trustees in uniting and in dividing school districts; *Miller v. Trustees of Schools*, 88 Ill. 26; *Moreland v. Whitford*, 54 Wis. 150; or of a town board in removing an assessor; *Merrick v. Town Board*, 41 Mich. 630; or of a city council in removing a city officer; *Mayor v. Shaw*, 16 Ga. 172; or of a city council in granting a ferry license; *Ex parte Fay*, 15 Pick. 243; or of a board of supervisors in ordering an election to re-locate a county seat; *Herrick v. Carpenter*, 6 N. W. Rep. 574; or of a board of supervisors in creating the office of clerk of said board and raising certain salaries which had been fixed by statute; *Robinson v. Supervisors*, 16 Cal. 208. The foregoing are a few of the many cases where this writ has been held to lie, and sufficiently illustrate the rules above stated.

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The proceedings by which the boundaries of the drainage district in question were enlarged by the drainage commissioners were, at least in most of their important features, judicial in their character. The commissioners were required to ascertain and determine from evidence whether the requisite number of the adult owners of land in the district had signed the petition for the annexation of the adjoining lands, and whether the signers were the owners of the requisite proportion of the lands embraced within the district. They were also required to ascertain and determine from evidence whether the lands sought to be annexed to the district were involved in the same system of drainage and required for outlets the drains of the district. When these facts were determined judicially, and not till then, were the commissioners authorized by the statute to enter their order annexing said lands. From their decision no appeal was given, nor were any other means provided by the statute for reviewing their proceedings. In every point of view then the case comes within that class of cases where *certiorari* is an appropriate remedy.

But as the appellants insist that a different rule has been announced by this court in various of its decisions, we will briefly consider the cases to which we are referred as sustaining that contention. *Renwick v. Hall*, 84 Ill. 162, *Keigwin v. Drainage Commissioners*, 115 id. 347, *Evans v. Lewis*, 121 id. 478, and *Samuels v. Drainage Commissioners*, 125 id. 536, were all cases in chancery, and it was held that there was no jurisdiction in a court of equity for the reason that there was a complete and adequate remedy at law, and that the legal existence of the several corporations involved in those cases could be determined by an information in the nature of a *quo warranto*. *Trumbo v. The People*, 75 Ill. 561, *People ex rel. v. Newberry*, 87 id. 41, *Osborn v. The People*, 103 id. 224, and *Blake v. The People*, 109 id. 504, were proceedings for the collection of either school taxes or special assessments, and the principle decided in those cases was, that the various school

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districts and drainage districts in question in those several suits were at least corporations *de facto*, and that the legality of the organization of a corporation could not be attacked collaterally. *Alderman v. School Directors*, 91 Ill. 179, was trespass, and the plaintiffs were directors of a *de facto* district, and the same rule was there declared. In *Hinze v. The People*, 92 Ill. 406, it was held that *quo warranto* would lie against persons who assume to hold offices supposed to be created by a law claimed to be invalid by reason of being in contravention of the Constitution; and in *People ex rel. v. Board of Education*, 101 Ill. 308, it was held that *quo warranto* also lies against a corporation which undertakes to exercise powers which it does not possess.

There is nothing decided in any of these cases which shows or tends to show the validity of either of the propositions insisted upon by the appellants in this case. All that is determined by those cases may be admitted, and yet *non constat* that the common law writ of *certiorari* does not lie in the present suit. No doubt some expressions were used in the opinions in several of those cases from which it might be inferred that an information in the nature of a *quo warranto* was the only mode of testing the legality of the formation of an existing *de facto* corporation, but that question did not arise and was not decided in those cases.

However, in the case of *Lees v. Drainage Commissioners*, 125 Ill. 47, it was expressly held that the common law writ of *certiorari* can not be resorted to for the purpose of determining whether a corporation has a legal existence, and that the validity of its organization can be questioned only by *quo warranto*. But there is this marked distinction between that case and this. There the corporate existence itself of a *quasi* municipal body was sought to be challenged by *certiorari*, while here such existence is fully admitted, and the only thing sought to be done is, to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto*

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and *de jure*, extending the boundaries of the drainage district. It seems eminently proper, and in consonance alike with the intention of the statute and the rules and analogies of the common law, that a proceeding, the object of which is to forfeit or destroy that corporate life which emanates solely from the sovereign power of the State, should be instituted by the attorney general or state's attorney of the proper county. It is said in section 788 of Angell & Ames on Corporations, citing in that behalf, *Rex v. Pasmore*, 3 Term Rep. 244, 245, and *Regents of the University of Maryland v. Williams*, 1 Gill & Johns. 365, that, "a *quo warranto* is necessary where there is a body corporate *de facto*, who take upon themselves to act as a body corporate, but from some defect in their constitution, can not legally exercise the powers they affect to use." It appears, however, from the same section, and from the authorities there cited, that where there is a legally existing corporation, capable of acting, which has been guilty of an abuse of power or of its franchises, then, not only will an information in the nature of a *quo warranto* lie, but *scire facias* as well. Nor do we perceive any good reason why a municipal body which has exceeded its jurisdiction and has proceeded illegally, may not, on sound legal principles, be proceeded against by *quo warranto*, by *scire facias* or by the common law writ of *certiorari* indifferently, as the one or the other may afford a proper and sufficient remedy. All of these several writs are direct remedies afforded by the law, and in respect to neither of them can it be said that it is a collateral attack upon the legal existence or organization of the corporation. As has been already suggested, this court has expressly held, in *Miller et al. v. Trustees of Schools*, 88 Ill. 26, that the common law writ of *certiorari* was an appropriate remedy to bring before the Circuit Court for review the proceedings of a board of trustees of schools consolidating two school districts into one; and that seems to be going quite as far, if not farther than is demanded by the requirements of the present case.

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Various propositions are submitted by counsel bearing upon the question of the validity of the annexation proceedings, but as we are disposed to view the case, but one of them need be considered. The forty-second section of the Drainage Act of 1885 under which said proceedings were had, provides as follows: "Drainage commissioners may at any time enlarge the boundaries of their district, by attaching new areas of land which are involved in the same system of drainage, and require for outlets the drains of the district made or proposed to be made, as the case may be, on the petition of as great a proportion of the land owners of the district so enlarged as is required for an original district."

Said section, in vesting the drainage commissioners with power to enlarge the boundaries of their districts, fails to prescribe the mode of procedure or the notice to be given to the owners of the land sought to be annexed. We can not for a moment entertain the view that it was the intention of the Legislature to leave these matters to the mere discretion of the commissioners, or that it was the legislative intent to vest the commissioners with power to annex to their districts adjoining lands, and thus subject such lands to the extraordinary burdens usually incident to the creation of a drainage system, without securing to the owners a right to notice and an opportunity to be heard. It is only in accordance with the plainest principles of natural justice that the land owners should have a right to be heard upon the question whether a proper petition has been presented, and whether their lands are involved in the same system of drainage and require for outlets the drains of the district, and an intention to deny such right will not be imputed to the Legislature, at least so long as the terms of the statute are such as to admit of any other conclusion.

In all matters pertaining to the original organization of drainage districts, whether of the class which lie entirely in a single town, or of those which include all or parts of two, three or more towns, in the same or different counties, careful

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and elaborate provisions are made for notice to the owners of the lands sought to be included in the district, such notice varying according to the nature of the district and the class to which it belongs. It is probable therefore that the Legislature deemed it unnecessary to repeat those several provisions in the section relating to the annexation of new territory to districts already organized, leaving it to the courts to import into that section, as a matter of construction, the rules as to notice applicable to the class of districts to which the one whose boundaries in each particular instance are sought to be enlarged properly belongs. So far as the land annexed is concerned, the annexation proceedings constitute its original organization into a district, and it is therefore in accordance with natural justice, but it is doing no violence to the language of the statute, to hold that the provisions applicable to notice in case of the original organization of special drainage districts lying, as does the one in question here, in three or more towns, in two different counties, should apply to proceedings to enlarge the boundaries of said district. It may be observed that this view is the one apparently taken by the drainage commissioners themselves in conducting the annexation proceedings, as there was a manifest attempt on their part to comply with the requirements of the statute as to notice.

The provisions of the statute in relation to the organization of special drainage districts embracing territory lying in three or more towns, whether in one or more counties, are to be found in section 50 of the Farm Drainage Act of 1885. That section requires notice to be given by posting up notices in at least five public places in each township in which the proposed district or any part of it shall lie, and also by publishing for three successive weeks a like notice in some newspaper in said county or counties, such notice to contain a copy of the petition, and state the day and term of court when such petition and all persons will be heard. It also provides that "the posting and first publication of said notice shall be at least

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twenty days before the hearing of said petition," and also that similar notices be mailed to each person owning lands in the district at least ten days before the hearing.

There can be no doubt that these provisions as to notice are mandatory and therefore jurisdictional. The mandate of the statute is that notice shall be given in the manner and for the time therein prescribed, before the time fixed for the hearing of the petition, and it follows logically that, in case of a failure in any respect to give the notice thus required, the power to hear and grant the petition can not arise. The jurisdiction is a special statutory one, and can be exercised only in the manner and under the conditions prescribed by the statute. Every attempt therefore to grant the petition and organize a district where the prescribed notice has not been given is nugatory and void. In this case it appears upon the face of the record that the first publication of the notice in a newspaper published in Tazewell county was on December 23, and the hearing was had on the 10th day of the following January, the first publication being only eighteen days instead of twenty days before the day on which the petition was heard. Most certainly, if the provisions of section fifty were applicable at all, as we think they clearly were, they not only required publication of notice, but its publication for the full period of twenty days, and such publication was essential to the authority of the commissioners to act. As such publication was not made there was a fatal defect of notice and a consequent defect of jurisdiction.

But it appears that the several land owners upon whose petition the writ of *certiorari* was issued, all appeared at the hearing of the petition for the enlargement of the boundaries of the district and urged their objection to the granting of that petition, and it is now contended that they thereby waived all defect of notice, and should not now be heard to object to the jurisdiction of the commissioners. Some of these parties objected to the consideration of said petition by the commis-

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sioners upon the express ground that the statutory notice had not been given, though none of them limited their objections to that point, but all urged other objections involving the merits of the petition.

It is probably true that, by appearing generally and contesting the petition upon its merits, they waived any defect of notice to themselves, and so far as such waiver went, they must now be held to be bound by it, and to have subjected themselves to all the legal consequences resulting therefrom. If jurisdiction of their persons, and through them of the particular lands of which they were the owners was all that was required to make the order of the commissioners granting the petition binding so far as they were concerned, it must be admitted we think that they have no standing here to object that the statutory notice was not given. But their relations to the subject matter of the petition were such as to give them the right to insist that the annexation of the lands proposed to be included in the district should be valid as a whole. All of said lands upon the theory of the petition, were involved in the same system of drainage, and therefore, if brought into the district by valid annexation proceedings, liable to contribute their due proportion of the expense of constructing and keeping in repair the ditches and drains of the district, thus lightening, to the amount of such contributions, the burden resting upon all the other lands in the district.

The subject may be illustrated thus: Suppose the proceeding was for the original organization of a drainage district embracing lands belonging to one hundred different proprietors. No sufficient notice having been given, five of said proprietors, owning but one-twentieth of the lands in the proposed district, appear generally and contest the organization of the district, but their objections being overruled, an order is entered assuming to organize a district embracing the lands of the one hundred proprietors. Such organization would be invalid as to nineteen-twentieths of the land and could impose

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no burdens thereon, but if the five owners who had appeared should be held to be estopped to insist upon such invalidity, the organization would as a legal consequence be held valid as to them, and all the expenses and burdens of the district would fall upon their lands. The true view we think is, that each land owner in the district, whether he appeared and contested the organization of the district or not, would have such interest in the question of the legality of the organization as to the lands of the other owners, as would give him the right, in any proper proceeding brought to test the question, to allege want of jurisdiction of the persons of the other land owners in the district, and of the lands owned by them, and to insist that for that reason the entire organization of the district was illegal and void.

The same reasoning applies with equal force to a proceeding like the present for the annexation of lands to a district already formed. In this case large portions of the lands sought to be annexed belonged to owners who did not appear or contest the petition, some of whom appear to have been minors. As to them the annexation proceedings were clearly illegal and void, and being void as to them, we are of the opinion that they were void in toto.

We therefore think that the Circuit Court properly entered a judgment quashing said proceedings, and that said judgment was properly affirmed by the Appellate Court. The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

MARY E. COALE

v.

THE MOLINE PLOW COMPANY et al.

Filed at Springfield November 1, 1890.

1. ALLEGATIONS AND PROOFS—*must correspond.* If a complainant in chancery can recover at all, it must be upon the case made by his bill. He will not be permitted to make one case by his bill and another by his proofs.

2. So where a creditor's bill seeks to set aside a conveyance of land by a husband to his wife on the ground the conveyance was without consideration, and fraudulent as against creditors of the former, the deed can not be held to be fraudulent as being unlawful preferences, in contravention of the Voluntary Assignment act.

3. FRAUDULENT CONVEYANCE—*deed from husband to wife—consideration.* Where a wife has, from time to time, received various small sums of money as her separate property, a portion of which went into her husband's hands, but without any stipulation as to repayment, and no interest was asked or received, and no accounting had in respect thereto until the larger part of it was barred by limitation, the moneys so coming to the husband's hands will not form a sufficient basis to sustain a conveyance by him to the wife, as against the rights of his creditors.

4. SAME—*pursuing the fund into the hands of the grantee.* In case a grantee has received property knowing that the owner was intending thereby to place it beyond the reach of his creditors, a court of equity will follow it into the hands of such grantee, and subject it to payment of the grantor's debts.

5. So where a fraudulent grantee of real estate or other property sells or mortgages the same to a *bona fide* purchaser or mortgagee, such fraudulent grantee will be liable to the creditors of his grantor for the value of the property so received and sold, or for the money received by him under the mortgage; and in the latter case he will be held to account for the money received on the mortgage, without regard to the use made of it, unless its use inured to the benefit of the creditor.

6. CREDITOR'S BILL—*priority to the diligent—who may complain.* The fraudulent grantee of property conveyed in fraud of creditors can not assign for error the giving of priority to the creditors on whose bills the conveyance is set aside.

134	350
49a	310
50a	673

134	350
77a	393

134	350
85a	519

134	350
185	51

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7. *SAME—preserving rights of third persons—as to lands not involved in the litigation.* Where the creditors, on bill to set aside a fraudulent conveyance, consent to a decree for the sale of a tract of land not in fact included in the fraudulent deed, and which therefore passed to the grantor's assignee, who was not made a party, the decree will be modified so as to make the sale subject to the title acquired by the assignee, as well as to the dower and homestead rights therein of the defendants.

8. *EVIDENCE—declarations of grantor to defeat grant.* On bill by creditors to subject land conveyed by their debtor to his wife to the payment of their judgments, the declarations of the debtor subsequent to his conveyance will not be competent evidence against the wife.

APPEAL from the Circuit Court of McLean county; the Hon. ALFRED SAMPLE, Judge, presiding.

This was a creditor's bill, filed in the McLean circuit court, by the Moline Plow Company, a corporation, against appellant, Mary E. Coale, and her husband, Griffith E. Coale, and Lewis Hormell, to set aside as fraudulent as to creditors a deed executed July 28, 1884, by Griffith E. Coale and Mary E., his wife, to Vincent M. Coale, and a deed from said Vincent M. back to the said Mary E., and to subject the land thereby conveyed, to the satisfaction of a judgment in favor of the plow company, and against the said Griffith E. Coale, obtained in the McLean circuit court. Subsequently, Scott Arnold filed an interpleader, setting up a judgment in his favor, against said Griffith E. Coale, and praying that said deeds be set aside and the lands subjected to the payment of his judgment.

The original bill proceeds on the basis that the deeds were fraudulent as to creditors, for the reason that they were made without consideration, and to hinder and delay the creditors of Griffith E. Coale, and contained apt averments thereof. Answers were filed to the original bill and bill of interpleader. It was discovered after the filing of such bills, that one of the forty-acre tracts of land attempted to be conveyed by the said deeds was misdescribed. The deeds described the north-east quarter of the south-east quarter of section 31, town 24, north, range 4, east, and the south-west quarter of the north-east

Statement of the case.

quarter of the same section, when it was intended to convey the first mentioned tract and the south-west quarter of the *south-east* quarter of said section, the same being the land then owned by the said Griffith E. Coale.

The answer of defendant Hormell set up that he had loaned to said Mary E. Coale the sum of \$1000, and had taken a mortgage upon said land as security, relying upon her title in good faith, and without notice of the facts set up in the bills. The answers of Mary E. and Griffith E. Coale denied the allegations of fraud, or that the conveyance was intended to hinder or delay creditors, and set up that said Mary E. was a purchaser for value, and without notice of the matters set up in the bill, etc. The consideration paid, and the circumstances of the purchase, are fully averred.

It appears that on the 31st day of July, 1884, three days after the making of said deed, Griffith E. Coale made an assignment to one Myers, for the benefit of creditors, which was duly filed; that said assignee entered upon the duties of the execution of that trust; that at the time of filing the original bill, (October 11, 1887,) dividends to the amount of twenty-three per cent had been paid upon the claims of creditors, including the claims of complainants in each of said bills. Mary E. Coale filed her cross-bill against the said Griffith E., the assignee, Myers, said complainants, and sundry other creditors of the said Griffith E., alleging the mistake in said deeds, and praying that the said Griffith E. and the said assignee be required to convey to her the tract owned by the said Griffith E. and omitted from the said deeds, to-wit., the south-west quarter of the *south-east* quarter of said section 31, which she had purchased, and in lieu of which had been conveyed the south-west quarter of the *north-east* quarter, and for other relief. Griffith E. Coale, and Myers, assignee, defaulted upon the cross-bill. The other defendants answered, denying the *bona fides* of her purchase, and of her right to the relief sought.

Brief for the Appellant.

The circuit court found the conveyances to be fraudulent, and set them aside, and required that the lands be sold,—the said south-west quarter of the south-east quarter subject, however, to the homestead right of Griffith E. and Mary E. Coale therein, and also subject to the dower of said Mary E. therein, and that the other tract—the north-east quarter of the south-east quarter of said section—be sold, subject to the dower right of the said Mary E. therein, and giving priority in payment to the Moline Plow Company, etc., and finding that the mortgage executed by the said Mary E. to the defendant Hormell was a valid and subsisting lien upon said land, and that said Hormell stood in the position of an innocent purchaser without notice, and required the said Mary E. Coale to pay off and satisfy the same, and in default thereof within the time limited, a personal decree was rendered against her for the amount of such mortgage lien. The decree dismissed her cross-bill as to all of the defendants therein except the said Griffith E. Coale and said Myers, and upon their default, but without prejudice to the rights of the complainant and other creditors of the said Griffith E., ordered them to convey their right and interest in said land to the complainant in the cross-bill,—Mary E. Coale. The latter alone prosecutes this appeal.

Mr. THOMAS F. TIPTON, for the appellant:

Husband and wife, since the Married Woman's act, as respects the separate property or estate of the wife, stand before the law as strangers. *Patten v. Patten*, 75 Ill. 451; *Tomlinson v. Matthews*, 98 id. 178; *Patrick v. Patrick*, 77 id. 555; *McQuown v. Low*, 18 Bradw. 37.

To render even a voluntary conveyance void, even as to prior creditors, it must be affirmatively shown that the grantor was insolvent, or at least deeply indebted. *Gudgel v. Kitterman*, 108 Ill. 50; *Patrick v. Patrick*, 77 id. 555; *Bridgford v. Riddell*, 55 id. 261; *Gridley v. Watson*, 53 id. 186; *Tunison v. Chamblin*, 88 id. 378; *Faloon v. McIntyre*, 118 id. 292.

Brief for the Appellees.

Such a voluntary conveyance is good against subsequent creditors. *Durand v. Weightman*, 108 Ill. 489; *Wooldridge v. Gage*, 68 id. 157; *Bridgford v. Riddell*, 55 id. 261; *Mixell v. Lutz*, 34 id. 382; *Tunison v. Chamblin*, 88 id. 378; *Jackson v. Miner*, 101 id. 550; *Ward v. Enders*, 29 id. 519.

A wife stands the same as any other creditor of her husband, and he may prefer her, if done in good faith. *Whitford v. Daggett*, 84 Ill. 144; *VanDorn v. Leeper*, 95 id. 35; *Tomlinson v. Matthews*, 98 id. 178; *Tyberandt v. Raucke*, 96 id. 71; *Rudershausen v. Atwood*, 19 Bradw. 61; *Schroeder v. Walsh*, 120 Ill. 411; *Hamilton v. Hamilton*, 89 id. 349; *Patrick v. Patrick*, 77 id. 555; *Blenerhasset v. Sherman*, 105 U. S. 116.

Mr. JOHN T. LILLARD, for the appellees:

Transactions between husband and wife, on account of the great facilities their secret and intimate relation affords for the commission of fraud, should be closely scrutinized, to see that they are fair and honest, and not mere contrivances to place the husband's property beyond the reach of his creditors. *Harton v. Dewey*, 53 Wis. 410; *Tomlinson v. Matthews*, 98 Ill. 187; *Schroeder v. Walsh*, 120 id. 411.

The fraud proven sustains our creditor's bill, without reference to the preferential fraud against the assignment statute. There is more than enough evidence to demonstrate a fraud between the husband and wife, to place the bulk of his property in her name to hinder and delay his creditors. *Frank v. King*, 121 Ill. 250; *Guffin v. Bank*, 74 id. 259; *New v. Oldfield*, 110 id. 138; *Post v. Steger*, 29 N. J. Eq. 554; Rev. Stat. chap. 59, sec. 4.

The gross inadequacy of the consideration renders the deed fraudulent. *Gordon v. Reynolds*, 114 Ill. 118; *Murtha v. Curley*, 90 N. Y. 372.

The fraud in evading the Assignment law affects and destroys the consideration of the preferential deed. *Preston v.*

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Spaulding, 120 Ill. 208; *Oil Co. v. Bank*, 126 id. 584; *Bouton v. Dement*, 123 id. 142.

The assignee of Coale has no right to impeach or set aside a fraudulent transfer of his assignor, that right belonging to the creditors. *Bouton v. Dement*, 123 Ill. 149.

As to the right of complainant to a preference, see *Rappleye v. Bank*, 93 Ill. 396; *Lyon v. Robbins*, 46 id. 276; *Ballantine v. Beale*, 3 S. C. 203.

This appellant can not complain of an error which does her no harm, as she seeks to do here, if there is an error. *Worden v. Crist*, 106 Ill. 333; *Insurance Co. v. Peck*, 102 id. 265; *Bowman v. Railroad Co.* id. 460; *Jefferson v. Jefferson*, 96 id. 551; *Downey v. O'Donnell*, 92 id. 559.

There should be a personal decree against appellant for the mortgage she placed on the fraudulently conveyed property. *Chamberlin v. Jones*, 114 Ind. 458; *Ferguson v. Hillman*, 55 Wis. 190; *Murtha v. Curley*, 90 N. Y. 372; *Salinsky v. Savings Bank*, 85 Tenn. 372.

MR. JUSTICE SHOPE delivered the opinion of the Court:

This case is encumbered with many unnecessary and extraneous matters, which must necessarily be eliminated in its consideration. If the complainants in the original bill and the bill of interpleader can recover, it must be upon the case made by their respective bills. A complainant is not permitted to make one case by his bill and another by his proofs.

The original bill is simply a creditor's bill, and seeks to subject the land standing in the name of appellant, to the payment of complainant's debt, upon the ground that the conveyance thereof to appellant was without consideration, and fraudulent as against creditors of her husband. Under the frame of this bill, and its allegations, the deeds can not be held to be fraudulent, as being unlawful preferences, in contravention of the provisions of the Voluntary Assignment act. However, after a careful and thorough consideration of the

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evidence, we can not say that the chancellor was not justified in finding that the deeds were executed and delivered for the purpose of hindering and delaying the creditors of Griffith E. Coale, and in decreeing that they be set aside, and the lands subjected to the payment of the judgment rendered in favor of the complainants and other creditors named in the decree.

Coale had formerly lived upon this eighty-acre tract of land, and about 1883 sold off his farm stock and implements, purchased a stock of hardware in Bloomington, and removed there with his family, retaining the land in his own name. It would seem that he partially obtained credit upon the basis of his ownership of it. The business in which he engaged proved disastrous, and in something like eighteen months he had become involved to an amount far in excess of the value of all his assets, his indebtedness aggregating substantially \$20,000, a part of which was included in the judgments before mentioned. Finding himself in this condition, and being indebted to his relatives in the sum of about \$1600, and also claiming to be indebted to his wife, he conveyed, through his cousin, Vincent M. Coale, one forty of said lands, and attempted to convey the other to his wife, in consideration of such indebtedness to her, and her assumption of the sum so owing to his other relatives.

It is manifest, we think, that if there was any valid indebtedness to the wife of Coale, the amount was very inconsiderable. It is true that Mrs. Coale, at one time or another, received various small sums of money as her separate property, from various sources, some of which went into the hands of her husband. There was, however, no stipulation for its repayment. No interest was asked or received, and no accounting had in respect thereof, until long after most, if not all, of it was barred by the Statute of Limitations, and not until it became convenient to form a basis for this conveyance. No good purpose can be served by an analysis of the evidence. No one who is impartial can read it without being impressed

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with the fact that the wife was, in all these transactions, the mere instrument in the hands of her husband to effectuate his purpose, and that his purpose was to save this land and put it beyond the reach of his creditors. That she was the passive instrument of the husband, is further evinced by the management and control of the farm after its conveyance to her, and in respect to the payment of the money owing to the relatives, which she had assumed. She mortgaged the land for \$1000, and gave the money into the hands of her husband to re-stock the farm. From that time on until the filing of the original bill,—a period of more than three years,—the husband managed and controlled the business in his own way, without accounting to her, or keeping any account thereof. He testifies that she entrusted the entire control to him, and received no money except such as a wife would receive from a husband for her necessary use. The declarations of Mr. Coale subsequent to the conveyance would not be competent evidence against his wife; yet, for the purpose of showing his intent in making the conveyance, it is abundantly proved, not only by the transaction itself, but by his declarations, that it was to save the land as a home, and keep it from his creditors. In respect of the indebtedness to relatives, which she had assumed, it is not shown that a dollar of it was paid with her individual means, but it is shown that it was paid out of the proceeds arising from the farm.

We can not extend this opinion by a further reference to the evidence. It must suffice that we have carefully examined it, and are of opinion that the case falls directly within the rule announced in *Frank et al. v. King et al.* 121 Ill. 250. While the husband, although in failing circumstances, might have preferred his wife to other creditors, if done in good faith and for a valuable consideration, (*Tomlinson v. Matthews*, 98 Ill. 178,) the reasoning in the *Frank* case is applicable, and it must be held that good faith and valuable consideration were here both wanting.

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The rule is well established, that where a fraudulent grantee has received property knowing that the owner is intending thereby to place it beyond the reach of his creditors, a court of equity will follow the property into the hands of such a grantee, and subject it to the payment of the owner's debt; and, also, that where such fraudulent grantee of real estate or other property sells or mortgages the same to a *bona fide* purchaser or mortgagee, such fraudulent grantee will be liable to the creditors for the value of the property so received and sold, or for the money received by him, under the mortgage. And in the latter case he will be held to account for the money received on the mortgage, without regard to the use made of it, unless its use inured to the benefit of the creditor. (*Mason et al. v. Pierron*, 69 Wis. 585; *Chamberlain v. Jones*, 114 Ind. 458; *Salinsky v. Lincoln Savings Bank*, 85 Tenn. 372.) This case can not be distinguished, in principle, from those cited, and many others to be found in the books. We are not prepared to say, that the fact of Mrs. Coale being apparently the passive instrument in the hands of her husband to effect his fraudulent designs, can, in view of the fact that she claims the property as her own under the fraudulent conveyance, effect a change in the result. If, when apprised of the purposes for which the conveyance had been made, she had voluntarily surrendered the property, there would be at least apparent great injustice in rendering her separate property liable for the money borrowed of Hormell, and which had been taken and expended by the husband. This she does not do, but seeks, by her answer and testimony, to carry into effect the fraudulent purpose and design of her husband, and avows the borrowing of the money and makes it her act, by which, although the money, by her consent, went into the hands of the husband, the estate will be diminished, so far as availability to the creditors is concerned, to the extent of this mortgage, if she be not required to discharge the mortgage lien. We are constrained to hold, that by her act in executing the

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mortgage to Hormell, and her subsequent ratification and adoption of it, the chancellor was also justified in rendering the personal decree against her.

It is complained that the court erred in decreeing priority to the complainants in the original bill and bill of interpleader. It is sufficient to say, that no one interested therein is here complaining. It can not affect the appellant, here, whether the proceeds of the land have been decreed to be paid to one creditor or another.

The complainants having consented to the taking of a decree against Griffith E. and Mary E. Coale, for the sale of the forty-acre tract of land, the title of which remained in Griffith E. Coale, and which would necessarily pass, under the deed of assignment, to the assignee, without having made the assignee a party to the original bill or bill of interpleader, will necessarily sell the same, not only subject to the dower and homestead rights mentioned and reserved in the decree, but also subject to the title acquired by the assignee. (*Preston v. Spaulding*, 120 Ill. 208; *Davis, Cory & Co. v. Chicago Dock Co.* 129 id. 180.) It is unnecessary for us to pass upon the effect of the decree requiring the assignee to convey to Mary E. Coale that forty-acre tract of land. It is true, the question is fairly and properly presented by the record, but no cross-errors are assigned, and Mrs. Coale, the only person assigning error upon this record, makes no complaint of this portion of the decree.

The decree will therefore be modified so as to require the sale of that forty-acre tract to be made subject to the right, title and interest acquired by the assignee, if any, under the deed of assignment, as well as subject to the dower and homestead rights reserved in and by the decree. In all other respects the decree is affirmed.

Decree modified.

Syllabus.

ARTHUR HOSMER

v.

THE HUNT DRAINAGE DISTRICT.

Filed at Springfield November 1, 1890.

1. DRAINAGE LAW—*proceeds of additional assessment—where to be applied—requisites of petition and notice.* A petition for leave to raise an additional sum by assessment for the purpose of repairing or strengthening and improving a levee, and the notice thereof, need not state where the money shall be expended when raised. It may be used outside of the district, under the order and direction of the court.

2. SAME—*modification of orders—notice.* Where the county court has once acquired jurisdiction, by proper notice, etc., of the matter of a special assessment of lands benefited, for the purpose of improving a levee, it may modify its orders from time to time, whenever necessary, until the matter is finally disposed of, without any further notice to the land owners.

3. PRACTICE—*taking case under advisement—entry of judgment as of a preceding term.* The county court, after the hearing of objections to the confirmation of special assessments upon lands in a drainage district, has the right to take the case under advisement for a reasonable time; but the propriety of the practice of entering judgment at a succeeding term as of the one at which the hearing was had, will not be considered when no injury can result therefrom.

4. APPEAL—*judgment nunc pro tunc.* Where a county judge takes a case under advisement, and at a subsequent term gives judgment and directs it to be entered as of the preceding term, the parties will have the same right of appeal or to sue out a writ of error as if the judgment was rendered at such subsequent term, and also the right to a bill of exceptions, on proper application.

WRIT OF ERROR to the County Court of Hancock county;
the Hon. L. Y. SHERMAN, Judge, presiding.

Mr. G. EDMUNDS, Mr. W. C. HOOKER, and Mr. W. H. MANIER,
for the plaintiff in error.

Mr. WILLIAM N. GROVER, and Mr. D. MACK, for the defendant
in error.

Opinion of the Court.

Mr. JUSTICE CRAIG delivered the opinion of the Court :

This was a writ of error, brought by Arthur Hosmer, to reverse a judgment of the county court of Hancock county, confirming an assessment in the Hunt Drainage District, in Hancock county, on June 14, 1887, as of April 6, 1887.

The organization of the Hunt Drainage District, embracing 16,039¹²/₁₀₀ acres of land, is conceded. It is also conceded that an assessment of \$65,311.78 was made against the lands of the district, and confirmed January 20, 1880. This is called the first assessment, and its validity is not called in question by this proceeding. On the 24th day of August, 1881, a petition for a second assessment was filed in the county court, and due notice given for a hearing on September 19, 1881. This petition was filed under the Drainage act of May 29, 1879, as amended by the act of May 24, 1881. Laws of 1879, p. 120; Laws of 1881, p. 79.

It is insisted that the petition and notice of August 24, 1881, for the second assessment, related only to work proposed to be done within the district in Hancock county, and did not authorize the orders of May 5, 1884, or November 18, 1886, hereinafter set out, for assessments to pay for work out of the district, and that such orders are void. The petition alleged that a levee had been constructed, giving a description thereof. It then averred that the levee was not sufficiently strong, nor of sufficient height, to protect the lands in the district, and ought to be strengthened, giving a detailed description of the proposed improvement, concluding with a prayer for an order for such additional work, and for a jury to assess damages and benefits occasioned by the construction of the work.

Section 2 of the act of May 29, 1879, authorized a petition to be filed for a second assessment to pay for improvements of a levee, and provides what the petition shall contain, as follows: "If the purpose of the owners is the repair and maintenance of a ditch or ditches, levee or levees, or other work

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heretofore constructed under any law of this State, said petition shall give a general description of the same, with such particulars as may be deemed important." Section 3 of the act, as amended by the act of May 19, 1881, provides that the county clerk shall give three weeks' notice of the presentation and filing of the petition, by posting notices, and publication in a newspaper at least once a week for three successive weeks. The section also provides what the notice shall contain. Section 4 of the act of 1879 provides: "The county court in which such petition shall be filed, may hear the petition at any probate term, and may determine all matters pertaining thereto under this act, and may adjourn the hearing from time to time, or continue the cause, for the want of sufficient notice, or other good cause." Section 5 of the act of 1879, as amended in 1881, provides for a hearing and the appointment of three commissioners. Section 9 of the act of 1879 provides, that in case the prayer of the petition is for the purpose of repairing and maintaining a levee theretofore constructed, it should be the duty of the commissioners to examine the levee, and report to the court certain matters specified in the section. Section 11 provides: "If the commissioners shall find that the proposed work * * * can be done at a cost not exceeding the benefits, they shall proceed to have the proper surveys, profiles, plans and specifications thereof made, and shall report their conclusions, and a copy of such surveys, plans and specifications, to the court."

Under the foregoing provisions of the act the petition for a second assessment was filed, and notice given as required by the statute. The petition was heard by the court, and an order entered requiring the commissioners of the district to prepare surveys, profiles, plans and specifications of the proposed work, and report to the court, with their conclusions. On the 16th day of June, 1882, the commissioners filed their report, in which, among other things, they estimated the cost

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of the improvement proposed to be made on the levee, at the sum of \$120,000, besides \$95,000 for interest on bonds to be issued to raise money for the work. Upon filing the report, no immediate action was taken by the court upon it. Subsequently, and on September 18, the commissioners filed an amended report, reducing the estimated cost of the work from \$120,000 to \$75,000. Thus far no objection is made to the proceedings. On May 5, 1884, the court modified the report, and reduced the estimated cost of the work from \$120,000 to \$75,000, and as modified the report was approved and confirmed. The order also contained the following:

“Whereas, it is estimated by said commissioners that said Hunt Drainage District may be better protected from overflow by joining with a drainage district in Adams county, Illinois, and that if proper arrangements can be made between said Hunt Drainage District and any district in Adams county, aforesaid, to accomplish that end, the expense of constructing proper levees and drains will thereby be lessened \$9000 of said bonds:—

“Now, to accomplish this end, said commissioners are hereby authorized to use the bonds in this order authorized, not exceeding \$34,000, in aid of the construction of the levee, cross-levee, or other necessary work to protect said Hunt Drainage District from overflow, as the said commissioners, in their judgment, shall deem best for the interest of their said district. And in case such an arrangement can, by reasonable diligence on the part of said commissioners, be made to protect said Hunt Drainage District from damage by overflow, by the construction of levees or other works in said county of Adams, then said commissioners shall not issue over \$66,000 of the bonds in this order authorized, and the tax to pay interest, etc., proportionally reduced. And the issue of said bonds above said \$66,000 shall in no event be made without the approval of this court, upon a showing by said commissioners that they

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are unable to make reasonable and proper arrangements for the construction of said work in Adams county, as above contemplated."

On November 4, 1886, the commissioners reported to the court that they had entered into a contract with Lima Lake District, in Adams county; that under the contract they were to expend \$30,000 in bonds in making the improvement in Lima Lake District; that it will be necessary to expend the full sum of \$75,000 in the two counties. The court approved the report, and ordered that the sum of \$75,000 be applied in the construction of the work, as provided in the contract entered into between the two districts, and ordered that the benefits and damages be assessed by a jury.

If the petition had contained an allegation that the money to be raised was required to be used for an improvement in the two districts, and had been followed by a notice of an application for such an improvement, it is not claimed, in the argument, that the order authorizing the expenditure of money out of the district would be illegal. The object of the petition was to raise money to improve and repair the levee. The filing of the petition and publication of notice as required by the statute, conferred jurisdiction on the county court. The question presented by the petition was, whether an assessment should be made to improve and repair the levee,—not where or the precise mode in which the money should be expended. If the levee was in such a condition that the interests of the district required that it should be improved and repaired, for the purpose of protecting the lands of the district from being overflowed with water, then it was proper for the court, upon hearing the petition, to order such an amount to be raised as might be needed to place the levee in proper repair,—and where the money should be expended was a matter which might be determined by the court. We think this is apparent from the language of section 37 of the act of 1885. (Laws of

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1885, p. 124.) That section declares: "Said commissioners may use money arising from the collection of assessments, or coming into their hands as such commissioners, for the purpose of compromising suits and controversies arising under this act, * * * and for the purpose of constructing or repairing or maintaining any ditch, ditches, drains, levee or levees, within said district, or outside of said district, necessary for the protection of the lands and complete drainage of the same within such district: *Provided*, that the commissioners shall use such money under the direction and approval of the court." This section in plain terms authorizes money to be expended out of the district, under the order of the court, and we do not think that it was essential that the petition asking for an assessment should allege whether the money, when raised, was to be used in or out of the district. It was enough that the money was required to repair the levee, leaving the expenditure to be controlled by the order of the court.

It is also said, that the court had exhausted its power, under the petition and notice, when the order of 1884 was entered. The order of 1884 was not a final disposition of the matters arising under the petition. It was made, as its terms clearly establish, subject to contingencies which might arise in the future, and the court retained control over the case, to make such further order as might be required in the future.

It is also said, the order of 1886 ignores the order of 1884. So long as the court had control of the subject matter embraced in the petition, it had the power to modify or change any prior order entered in the case, and it was proper to do so whenever necessary to further the ends of justice.

It is also said, that both the order of 1884 and that of 1886 direct a sum certain to be assessed against the lands, regardless of benefits, and hence they are without authority of law. This is a misapprehension of the meaning of the orders. As we understand the orders, they do not undertake to direct the

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assessment of any amount on the lands of the district. They limit the amount that may be raised, but the assessment of the amount of benefits which would arise from the improvement was left where the law placed it,—for the determination of a jury which might afterwards be selected for that purpose.

It appears from the record, that the jury selected to assess the benefits made the assessment, and the assessment roll was returned for confirmation in February, 1887. Objections to the confirmation were heard at the March term of the court, 1887, and the court held the application for confirmation under advisement until June 14, when the court overruled the objections, confirmed the assessment, and ordered the clerk to enter a judgment as of the March term, when the cause was submitted to the court, and it is insisted that the court had no power to enter judgment in June as of the March term. The court, after the hearing at the March term, had the right to hold the case under advisement for such a reasonable time as might enable the court to properly dispose of the case. But whether it was regular or good practice to enter the judgment in June as of the March term, it will not be necessary to determine, as the manner in which the judgment was entered did not in the least injure the plaintiff in error, or deprive him of any right. He had the same right to appeal or sue out a writ of error as if the judgment had been entered as of the June term of court; and, we may also add, that on proper application he would have been entitled to a bill of exceptions preserving the evidence.

The judgment of confirmation will be affirmed.

Judgment affirmed.

Syllabus.

REBECCA MCGARVEY

v.

HARVEY DARNALL et al.

Filed at Springfield November 1, 1890.

1. ADMINISTRATION OF ESTATES—*administration in different States—judgment in one State as evidence in another.* Where administration is granted in different States to different persons, in respect to the same estate, there is no privity between the several administrators. Therefore, a judgment against the administrator in one State is not competent testimony to show a right of action against either a domiciliary or an ancillary administrator in another State, so as to affect assets in such other State.

2. In a proceeding for the partition of land in this State, one of the defendants, by cross-bill, set up the allowance of a claim in his favor against the estate of the deceased ancestor in the State of Iowa, the residence of the decedent at his death, and asked to have such judgment paid out of the proceeds of the land in case of a sale, but made no proof of the justness of the claim, other than the production of the judgment of allowance in Iowa: *Held*, that the cross-bill was properly dismissed for want of proof of the claim, and that the judgment of the Iowa court was not evidence against the heirs of the intestate.

3. SAME—*sale of land to pay debts—prior allowance of claim—how far conclusive upon the heirs—and herein, of a judgment in another State.* On application to sell lands for the payment of a claim allowed against an estate, such judgment of allowance, even if recovered in the State or jurisdiction where the lands are situate, is not conclusive on the heir, but is only *prima facie* a charge on real estate. But a judgment recovered in another State, allowing a claim against an estate, is not competent evidence to show even *prima facie* the validity of such claim, for the purpose of subjecting real estate of the intestate in this State to its payment.

4. While there is privity between the administrator and the heir in respect to personal estate left by the intestate, yet in respect of the realty of which such intestate died seized there is no privity.

5. Under the statute giving the heirs a right to contest a claim against the estate, the adjudication of the court in allowing a claim is held to be only *prima facie* binding upon the heirs, although they may have neglected to avail themselves of the right to contest its allowance in the county court in the first instance.

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Statement of the case.

APPEAL from the Appellate Court for the Third District;— heard in that court on appeal from the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

This was a bill in chancery, filed August 21, 1883, by Harvey Darnall and Agnes Darnall, against appellant and the other heirs of Amelia Darnall, who died on the 18th day of February, 1883, intestate, in Henry county, Iowa, where she then resided, for the partition of certain lands in Sangamon county, Illinois, of which she was seized at the time of her death. Appellant answered, and also filed a cross-bill, averring that letters of administration were duly granted upon the estate of said Amelia Darnall by the proper court in Henry county, Iowa; that on September 18, 1883, she filed in that court a claim against the said estate, and obtained judgment thereon for \$2545 and costs, which judgment, on appeal by the administrator, was affirmed by the Supreme Court of that State, and is in full force and wholly unpaid; that said decedent left no personal property whatever, nor any real estate except the lands described in the petition, and praying that if said lands can not be partitioned, and have to be sold, the court decree the payment, out of the proceeds, of her said judgment, with interest and costs.

It was shown that Amelia Darnall left no personal estate in Iowa, except \$400 in worthless promissory notes, nor any in Illinois, except one bed and one bureau, the value of which does not appear; that letters of administration were granted to the petitioner, Harvey Darnall, by the county court of said Sangamon county, but not until the 11th of November, 1884; that no claim has been filed in said court or presented to the administrator here, and that appellant is the only claimant, as creditor, against the said estate.

On final hearing in the Sangamon circuit court a decree was rendered dismissing the cross-bill and ordering partition as prayed for in the original bill. That decree was affirmed

Briefs of Counsel.

in the Appellate Court, and the cause then brought here by this appeal.

Mr. CHARLES A. KEYES, for the appellant:

It seems to be settled that a judgment against an administrator appointed in one State is not evidence of an indebtedness as against an administrator of the same estate appointed in another. *Judy v. Kelley*, 11 Ill. 211; *Rosenthal v. Renick*, 44 id. 202; *Stacey v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 id. 16.

It can affect no property of the decedent in another State, however or by whomsoever held, either directly or indirectly, as evidence of a claim or cause of action. *Low v. Bartlett*, 8 Allen, 259.

The Iowa judgment established appellant's demand against the estate of Darnall, not only in Iowa, but in every State in the Union. The claim is legally authenticated as against the decedent's estate, so as to entitle it to payment and satisfaction, though put to judgment in a different State than that of the administration. *McElmoyle v. Cohen*, 13 Pet. 312; *Cutright v. Stanford*, 81 Ill. 240.

The Iowa judgment was *prima facie* evidence against the heirs-at-law. *Stone v. Wood*, 16 Ill. 182; *Mason v. Bair*, 33 id. 206; *Lapton v. Janey*, 13 Pet. 385; *Hopkins v. McCann*, 19 Ill. 113; *Goeppner v. Leitzelmann*, 98 id. 414.

The act of Congress of 1790 extends to proceedings of a probate court. *Case v. McGee*, 8 Md. 9; *Houze v. Houze*, 16 Texas, 598; *Melvin v. Lyons*, 18 Miss. (10 S. & M.) 78.

It extends to any proceedings in another State which, by the laws, practice and usage of that State, is entitled to the faith and credit of a judgment. *Taylor v. Runyan*, 9 Iowa, 522.

Mr. ROBERT MATHENY, for the appellees:

If letters of administration are granted in different States to different persons, there is no privity between them, and a

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judgment against one will furnish no cause of action against the other. Freeman on Judgments, sec. 163; *Judy v. Kelley*, 11 Ill. 211; *Rosenthal v. Renick*, 44 id. 202; *Low v. Bartlett*, 8 Allen, 259; *Ela v. Edwards*, 13 id. 48.

Mr. JUSTICE BAKER delivered the opinion of the Court:

It was incumbent upon appellant to establish the case made by her cross-bill, by showing, at least *prima facie*, that the estate of Amelia Darnall, deceased, was justly indebted to her in the sum claimed, \$2545, or in some other amount. This she did not attempt to do, otherwise than by offering in evidence the record of a judgment for said sum of \$2545, recovered by her in the circuit court of Henry county, Iowa, against A. Roads, the administrator appointed in that State.

The doctrine is well settled, that if letters of administration are granted in different States to different persons, in respect to estate left by the same deceased person, there is no privity between such administrators, and that therefore a judgment against the administrator in one State is not competent testimony to show a right of action against either a domiciliary or ancillary administrator in another State, or to affect assets in such other State. Story on Conflict of Laws, sec. 522; Freeman on Judgments, sec. 163; *Judy et al. v. Kelley*, 11 Ill. 211; *Rosenthal v. Renick et al.* 44 id. 202; *Ela v. Edwards*, 13 Allen, 48; *Stacy v. Thrasher*, 6 How. 44; *McLean v. Meek*, 18 id. 16. While there is privity between the administrator and the heir in respect to personal estate left by the intestate, yet in respect to the realty of which such intestate died seized there is no privity. (*Stone et al. v. Wood*, 16 Ill. 177; *Hopkins et al. v. McCann*, 19 id. 113; Freeman on Judgments, *supra*; *Low v. Bartlett*, 8 Allen, 259.) Hence, when application is made to sell lands for the payment of a claim for which a judgment has been obtained against the administrator, such judgment, even if recovered in the State or jurisdiction where the lands are situate, is not binding and conclusive.

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In the case at bar, the real estate sought to be subjected to the satisfaction of the claim of appellant is located in this State, and the judgment produced for the purpose of establishing the validity of such claim was rendered by a court of Iowa, and against an administrator who was appointed by a court of that State, and authorized to administer upon the property of the deceased within that State, only. The judgment was incompetent to show, even *prima facie*, the validity of the claim. (*Rosenthal v. Renick et al. supra*; *Low v. Bartlett, supra*.) Had the judgment for the demand of appellant been rendered by a county court of this State, and in due course of an administration under the authority and laws of this State, then it would have been competent evidence against the heirs, and would have established, *prima facie*, a charge upon the real estate in Sangamon county, or upon the proceeds to be derived from its sale.

Section 60 of chapter 3 of the Revised Statutes of 1874 provides, that when a claim is presented against an estate for allowance, if the executor, administrator, widow, heirs, or others interested in said estate, shall not object, the claimant shall be permitted to swear to his claim, but that if objection is made thereto then it shall not be allowed, without other sufficient evidence. In *Mason v. Bair*, 33 Ill. 194, this court, referring to this section, which was then a part of the Statute of Wills, said: "This section gives the heirs the right to be present and contest the justice of the claim. Having this right, the adjudication of the court in allowing the claim must be held *prima facie* binding upon the heirs, although they may have neglected to avail themselves of the right to contest its allowance." See, also, *Judy et al. v. Kelley, supra*; *Rosenthal v. Renick et al. supra*; *Hopkins et al. v. McCann, supra*; *Stone v. Wood, supra*; *Helm v. Cantrell*, 59 Ill. 524; *Gibson v. Gibson*, 82 id. 61; *Goepfner v. Leitzelmann*, 98 id. 409.

It is urged that the Iowa judgment had the same effect that an allowance in the county or probate court of this State would

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have had to prove, *prima facie*, as against the heirs, the validity of the demand of appellant against the estate of the intestate in this State. There are several reasons why this contention is not well founded. We have already seen, that whether the judgment against the administrator is in a court of this State or in the court of another State, there is no privity between the administrator and the heirs in respect to realty, and there being no privity, it is only by virtue of the statute above referred to that the adjudication had and allowance made in a court of this State is the establishment, *prima facie*, of the justice of the claim, as against such heirs, in respect to real estate. Besides this, such contention is inconsistent with the decisions of this and other courts, and we have been referred to no case where it has been held that the allowance of a claim against an administrator in one State is *prima facie* evidence against an heir or devisee in respect to realty in another State. Moreover, that in regard to which the Iowa courts had jurisdiction to adjudicate, was the property in that State, and that only; and when they assumed to adjudicate that the demand of appellant was a just charge upon the estate of the deceased, such adjudication had reference solely to the property in that State, and was efficacious in respect to that property, only. Besides this, it must be admitted that the allowance of the claim by that court, and against the administrator who derived his authority from a court of that State having probate jurisdiction, did not establish, even *prima facie*, the validity of such claim as against the administrator who derived his authority from the county court of this State, and who was appointed to administer upon all property of the intestate which was located in this State; and it would be anomalous and unreasonable to hold, that a court of another State could render a judgment which, while it was ineffectual to charge personal property of the intestate within this State, would be effective to impose a burden upon real property located here. Such a conclusion could only be reached

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upon the theory there was privity between the Iowa administrator and the heirs; but, as we have already seen, the only privity between them was in respect to the personal property in Iowa. It is quite usual for a person to own property, both real and personal, in many different States, and there may be administration in each one of such States. If the allowance of a claim in any one of these States afforded evidence to establish charges against the property in all the other States, it would, as may readily be seen, be productive of fraud. The rule contended for would render precarious the title of heirs to the lands inherited by them, and, by shifting the burden of proof, would impose upon them the unreasonable and difficult task of producing testimony to show the injustice of judgments rendered without notice to them, and in States other than that of their domicile.

It is further insisted, that the transcript of the Iowa judgment is duly authenticated and certified as required by the act of Congress, and that it is therefore, under the Federal constitution and the provisions of said act, entitled to full faith and credit. The correctness of this proposition must be admitted, but it has no application to the case in hand. The transcript shows a valid judgment against the administrator appointed under the laws of Iowa to administer upon the assets of the intestate within that State, but, *non constat*, that it proves or tends to prove a valid claim against the heirs of the intestate residing in this State, in respect to the lands inherited by them from such intestate.

The circuit court properly refused to admit the transcript of the Iowa judgment in evidence, and committed no error when it dismissed the cross-bill of appellant.

The judgment of the Appellate Court is affirmed.

Judgment affirmed.

WILLIAM WATSON

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield November 1, 1890.

1. CRIMINAL LAW—"Habitual Criminal act"—second or third offense—prior conviction—allegations and proofs. The act of June 23, 1883, prescribing the punishment in case of a second and third conviction for an offense of like character, expressly provides that the former conviction and judgment shall be set forth in apt words in the indictment, and this, like any other material allegation, must be proved as alleged. It is error to instruct the jury to fix the punishment of one convicted of burglary at twenty years, without regard to the fact whether there is any proof of a former conviction or not.

2. The first and second counts of an indictment charged simply a burglary, while the third charged a burglary and a previous conviction for burglary. The court instructed the jury to fix the defendant's imprisonment in the penitentiary at twenty years, if they should find him guilty of the offense charged in the first count and that he had been previously convicted of burglary: *Held*, that as the first count charged no former conviction the court erred in giving the instruction.

3. SAME—indictment—several counts. Where an indictment contains several counts, each count is to be treated as a separate charge, and must be complete within itself, except that for some allegations subsequent counts may refer to the first or former count.

WRIT OF ERROR to the Circuit Court of McLean county;
the Hon. ALFRED SAMPLE, Judge, presiding.

The plaintiff in error, William Watson, was indicted by the grand jury of McLean county, Illinois, at the February term, A. D. 1890, for the crime of burglary. The indictment contains four counts. The first count charges "that William Watson, late of said county, on the 26th day of March, in the year of our Lord one thousand eight hundred and eighty-nine, at and within the said county of McLean and State aforesaid, the dwelling house of Frank Bean, there situate, willfully, maliciously, forcibly, feloniously and burglariously did break

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and enter, with intent the goods and chattels of Mary Watson in said dwelling house then and there being found, feloniously to take, steal and carry away, and one gold ring, with amethyst setting, of the value of \$20, of the goods and chattels of the said Mary Watson, in said dwelling house then and there being found, did feloniously take, steal and carry away, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois." The second count is the same as the first, except that it charges the entry to have been made without force, the doors and windows of the house being open. It concludes the same as the first. Then follows a third count, beginning, "and the grand jurors aforesaid, chosen, selected and sworn, in and for the county of McLean, etc., upon their oaths aforesaid, do further present, that heretofore, to-wit, at the term of the circuit court of McLean county, in the State of Illinois, begun and holden at the court house in Bloomington, within and for said county and State, on the second Monday of September, 1885, one William Watson was indicted," etc., setting out an indictment for burglary, containing two counts, and averring a conviction, and sentence to the penitentiary thereon. It then avers that the said William Watson, being the same William Watson who was so convicted and sentenced, as aforesaid, after said conviction and sentence, to-wit, on, etc., at, etc., the dwelling house of Frank Bean broke and entered, etc., charging the crime of burglary. The fourth count seems to be an exact copy of the second.

At the trial, the court, at the request of the prosecution, gave the following instruction, numbered 22 :

"If the jury believe, from the evidence, beyond a reasonable doubt, that the defendant committed the crime charged in the first count of the indictment, in manner and form as therein charged ; and if you further believe, from the evidence, beyond a reasonable doubt, that the defendant was indicted by the grand jury of this county, in September, 1885, for the crime

Brief for the Plaintiff in Error.

of burglary and larceny, and that in November, 1885; the defendant pleaded guilty to said crime of burglary and larceny, and was by this court sentenced to the penitentiary for a term of two years; and if you further believe, from the evidence, beyond a reasonable doubt, that the defendant went to the penitentiary on said sentence, then, in such case, you should find the defendant guilty, *and fix the term that he shall serve in the penitentiary at twenty years.*"

Also, the following instruction:

"If you find the defendant guilty under the first count, for burglary, charging former conviction, say, 'We, the jury, find the defendant guilty in manner and form as charged in the first count of the indictment, *and fix the time he shall serve in the penitentiary at twenty years.*'"

The jury returned the following verdict: "We, the jury, find the defendant guilty *in manner and form as charged in the first count of the indictment, and fix the time he shall serve in the penitentiary at twenty years.*"

Motions for a new trial and in arrest of judgment being overruled, and sentence pronounced on the verdict, the defendant prosecutes this writ of error.

Mr. THOMAS F. TIPTON, for the plaintiff in error:

The first count of the indictment is an ordinary count for burglary and larceny, which, in legal effect, charges but one offense—that of burglary. Wharton on Crim. Law, sec. 417; *Joslyn v. Commonwealth*, 8 Metc. 236.

Where the jury find the defendant guilty on one count, and say nothing as to the other counts, this is equivalent to a verdict of not guilty as to such other counts. *Weinzorflin v. State*, 7 Blackf. 186; *Morris v. State*, 8 S. & M. 762; *State v. Phinney*, 42 Me. 384; *Rex v. Cradock*, 2 Den. Crown Cases, 31; *Commonwealth v. Hernet*, 2 Vig. Cas. 235; *People v. Gilmore*, 4 Cal. 376; *State v. Smith*, 33 Mo. 139; *State v. Mahling*, 1 Iowa, 239; *State v. Ross*, 29 Mo. 32; *State v. Martin*, 30 Wis.

Brief for the Plaintiff in Error.

216; *State v. Hill*, id. 416; *State v. Biedim*, 33 id. 120; *Stoltz v. People*, 4 Scam. 168; *Brennan v. People*, 15 Ill. 517; *Barnett v. People*, 54 id. 325; *Logg v. People*, 8 Bradw. 99.

The effect of the verdict was to put the second, third and fourth counts as completely out of the indictment as though such counts had never been found by the grand jury. *Logg v. People*, 8 Bradw. 99; *Mount v. State*, 14 Ohio, 295; *Shepherd v. People*, 24 N. Y. 406; *State v. Martin*, 30 Wis. 223; *People v. Gilmore*, 4 Cal. 276; *Hunt v. State*, 25 Miss. 378; *Campbell v. State*, 9 Yerg. 333; *Jones v. State*, 13 Texas, 168; *State v. Ross*, 29 Mo. 32; *Morris v. State*, 8 S. & M. 762.

Nor can he again be tried on the second, third and fourth counts of the indictment. *Logg v. People*, 8 Bradw. 89; *Brennan v. People*, 15 Ill. 517; *Barnett v. People*, 54 id. 325.

The Habitual Criminal act of 1883 provides that the former conviction or convictions must be set forth in apt words in the indictment. This evidently means that it must be set forth in apt words in each count of the indictment on which a conviction under the act is sought. For illustration: Suppose that the former conviction should be set forth in apt words in a count otherwise defective, can the party be convicted under the act under another and otherwise sufficient count, as in the case at bar the court instructed the jury, that if they should find the defendant guilty under the first count, in which there is no reference to the former conviction, they will fix his punishment at twenty years in the penitentiary? It can not be that there can be a conviction, under this statute, on a count making no reference in apt words to the statute, simply because there may be a reference to the statute in some other count in the indictment. In other words, it is not sufficient to set forth the former conviction in one of the counts, and then ask for a conviction on another of the counts. It must be set up in each of the counts, and there can not be a lawful conviction under this statute on a count making no reference to a former conviction.

Brief for the People. Opinion of the Court.

Mr. GEORGE HUNT, Attorney General, Mr. E. H. MINER, State's Attorney, and Mr. E. O'CONNELL, Assistant State's Attorney, for the People, commented on the facts and the authorities cited by the plaintiff in error, and contended that the reference to the former conviction in the second and third counts belongs to each count of the indictment.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

It is impossible to sustain this conviction without disregarding well established rules of law applicable to criminal trials. As will be seen from the foregoing statement, the attention of the jury was specially directed to the first count of the indictment by the twenty-second instruction, and they were directed to fix the prisoner's term in the penitentiary at twenty years, if they found he committed the crime charged in that count. It is true, it requires the jury to also believe, from the evidence, that the defendant had been previously convicted of the crime of burglary and larceny, and sentenced to the penitentiary; but it does not require that belief to be based on any charge made in the first count, or, in fact, any count of the indictment. The first count does not charge a former conviction. It is an ordinary count for burglary, and upon a conviction under it the jury could fix the punishment at confinement in the penitentiary for any number of years not less than one or more than twenty. It was therefore error to instruct it to fix the term absolutely at twenty years, if the conviction was based on that count.

It is said, however, that the allegation of former conviction may be referred to and treated as a part of the first count. This position can not be maintained. By all the rules of criminal pleading, where an indictment contains several counts each count is to be treated as a separate charge, and must be complete within itself, except that for some allegations subsequent counts may refer to the first or former counts. Here,

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however, there is no attempt to make any allegation in the indictment a part of the first count, except that which expressly appears in it. It can not be seriously contended that this indictment does not contain four separate and distinct counts, the third of which alone charges a former conviction. The pleader very properly put in these several counts, so that if his proof failed to meet the third, he might convict on either the first or second; and after the proof was in, he evidently intended to insist upon a verdict on the one charging the former conviction, but by mistake wrote "first count" in his instructions instead of "third count." The effect of that mistake can not be avoided by now attempting to make the first count charge that which it does not, and which, manifestly, it was not intended to charge.

But the twenty-third instruction is still more objectionable. It tells the jury, that if they find the defendant guilty under the first count, of *burglary*, to say, "We, the jury, find the defendant guilty in manner and form as charged in the first count of the indictment, and fix the time he shall serve in the penitentiary at twenty years." Under this instruction, if the jury found the defendant guilty of burglary they were bound to fix his punishment at twenty years, whether there was any proof of a former conviction or not. What is known as the "Habitual Criminal act," in force July 1, 1883, (1 Starr & Curtis' Stat. p. 832, sec. 351,) expressly provides that the former conviction and judgment shall be set forth in apt words in the indictment, and, of course, like any other material allegation, it must be proved as alleged. By this instruction the jury were not required to find that the defendant had been previously convicted of the crime of burglary, as a condition to their fixing his punishment at twenty years, and they did not so find. He was found "guilty in manner and form as charged in the first count of the indictment." The jury might have thought a less number of years in the penitentiary adequate punishment for the crime of which they convicted him;

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but under the instructions they were bound to either acquit, or fix his term at twenty years.

These instructions were erroneous. The judgment of the court below must be reversed and the cause remanded.

Judgment reversed.

WILLIAM GRAFF

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield November 1, 1890.

1. LARCENY—*sale of property alleged to have been stolen—whether authorizing a conviction.* On the trial of one upon a charge of larceny it was shown that a lot of cattle had been stolen in a particular county named, and that the defendant had sold the same cattle in another county. The court, on behalf of the prosecution, instructed the jury, substantially, that if they believed the alleged larceny had been committed, and that the defendant afterward removed the cattle from the county in which they had been stolen, to another county, and there sold them, then he was guilty of the crime of larceny. The defendant, testifying in his own behalf, stated that the cattle were delivered to him in the county in which they were charged to have been stolen, by another, with directions to make sale of them, which he did, in good faith and without knowledge that they had been stolen. The instruction was held to be erroneous, in that it authorized a verdict of guilty from the mere fact that the accused sold the property which had been stolen. All that was required by the instruction to authorize a verdict of guilty may have been proved, and yet the defendant be innocent of the crime for which he was being tried.

2. INSTRUCTION—*belief of the jury—to be predicated upon the evidence.* An instruction in a criminal prosecution directed the jury, that if they believed certain specified facts they might convict. The instruction was considered objectionable in not limiting the belief to be entertained by the jury to that produced by the evidence given on the trial.

3. SAME—*whether a faulty instruction is cured by others of a series.* Upon a prosecution under an indictment for larceny, an instruction was given on behalf of the People, directing the jury that if they should find certain facts they might convict; but it was considered that even if all that was required in the instruction to authorize a verdict of

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guilty, was proved, still the defendant may have been innocent of the crime charged, and, as the instruction assumed to state a complete case, it could not be truly said that it was but one of a series, and supplemented or qualified by others in the same series.

WRIT OF ERROR to the Circuit Court of Cass county; the Hon. LYMAN LACEY, Judge, presiding.

Mr. OSCAR A. DELEUW, and Messrs. MORRISON & WHITLOCK, for the plaintiff in error:

An instruction should require the jury to form their belief upon the evidence, only. *Steinmeyer v. The People*, 95 Ill. 383.

When the testimony is close or conflicting the law should be given to the jury accurately. *Ruff v. Jarrett*, 94 Ill. 475; *Swan v. The People*, 98 id. 610.

Mr. GEORGE HUNT, Attorney General, Mr. R. R. HEWITT, State's Attorney, Mr. J. N. GRIDLEY, and Mr. WILLIAM A. CRAWLEY, for the People.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This writ brings before us for review the record of the conviction of William Graff, in the circuit court of Cass county, of the crime of larceny.

The indictment, as originally presented by the grand jury, contained two counts, but before the trial the State's attorney entered a *nolle prosequi* as to the first count, and the trial and conviction were therefore under the second count alone, which charged a larceny of eighteen head of steers in Cass county, on the 25th of November, 1888. The evidence given upon the trial clearly proved that eighteen head of steers, belonging to Elizabeth Flynn, the grandmother of the plaintiff in error, were stolen from a pasture in Morgan county, some time in the month of November, 1888, and that they were sold by the plaintiff in error, on or about the 26th of November, 1888, to

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George Edwards, in Cass county. Plaintiff in error contends, and he so testified upon the trial, as a witness in his own behalf, that he received the possession of the cattle on the evening of November 24, 1888, from one J. N. McDonald, in the road, near Jacksonville, in Morgan county, for the purpose of selling them for said McDonald; that he did not know that they had been stolen, and that he sold them to George Edwards, in Cass county, in good faith, pursuant to this authority. There are also some circumstances proved, perhaps tending, though it may be slightly, to corroborate this evidence. The real controversy before the jury, therefore, was not whether the cattle had in fact been stolen, or whether plaintiff in error had in fact sold them to George Edwards, in Cass county, but whether plaintiff in error received them in good faith, as he testified he did, from McDonald, and afterwards sold them to Edwards for McDonald, or whether he himself stole them from the pasture in Morgan county.

The court gave the jury, at the instance of the prosecution, the following among other instructions, namely:

"3. That the indictment charges the larceny as having been committed by defendant in the county of Cass, and though you may believe that the larceny of said cattle was originally committed, if committed, in the county of Morgan, yet if you believe, beyond a reasonable doubt, that the defendant afterwards brought the said steers into the county of Cass and sold them there, under the statute of the State of Illinois the defendant is guilty of the crime of larceny of the said steers in the said county, the same as if the larceny had been originally committed in the said county of Cass, and you should find the defendant guilty of the crime in the said county of Cass."

This is objectionable in not limiting the belief to be entertained by the jury to that produced by the evidence given on the trial. The jury have no right to act on any belief which is not produced wholly by evidence given upon the trial. (*Ewing v. Runkle*, 20 Ill. 448.) But the vital objection is,

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that all that is here required to authorize a verdict of guilty may have been proved, and yet the plaintiff in error have been innocent of the crime for which he was being tried. If the steers were stolen in Morgan county,—not by the plaintiff in error, but by McDonald, or some one else,—and were afterwards placed by McDonald in the hands of plaintiff in error to sell for him, and if plaintiff in error then received them from McDonald in good faith, and drove them to Cass county, and there sold them for him, it is plain that he is not guilty of the offense whereof he was convicted,—and the evidence of the plaintiff in error tended to prove precisely that state of facts. But then, in the language of this instruction, the larceny of the cattle was originally committed in Morgan county, and the plaintiff in error afterwards brought them to Cass county, and there sold them. The instruction authorizes a verdict of guilty from the mere fact that the plaintiff in error sold property which had been stolen. The instruction assumes to state a complete case, and it can not be truly said that it is but one of a series, and supplemented or qualified by other instructions in the same series.

It may be that the preponderance of the evidence is that the plaintiff in error himself originally stole the cattle; but there was a conflict in the evidence in that respect, and the evidence introduced on behalf of plaintiff in error was of that importance that we can not say the plaintiff in error was not entitled to have the verdict of a jury, under correct instructions, upon it.

For the error in giving this instruction, the judgment below is reversed, and the cause is remanded for a new trial.

Judgment reversed.

THE WABASH EASTERN RAILWAY COMPANY OF ILLINOIS

v.

COMMISSIONERS OF EAST LAKE FORK SPECIAL DRAINAGE DISTRICT.

Filed at Springfield November 1, 1890.

1. DRAINAGE LAW—*organisation of district—how questioned.* On bill to foreclose the lien of special assessments by the commissioners of a drainage district, the defendants can not call in question the regularity of the organization of the district. That can not be questioned collaterally.

2. SAME—*admission of organization—what so regarded.* An unqualified admission, by answer and by stipulation, of the due organization of a drainage district under a certain act named, is an admission that all the steps necessary to a legal organization of the district were taken in manner and form as prescribed by the act, including the presentation of the petition, giving the name and post-office address of each of the several land owners, so far as known, and the giving of the requisite actual or constructive notice to all persons having any legal interest in the proceedings.

3. SAME—*notice—as to classification of lands, and levy of assessments—of the mode.* Section 60 of the Drainage act of 1885, which prescribes the mode of giving notice of the time and place for hearing objections to the action of the commissioners in classifying lands and levying assessments, only requires notice by publication, and it is immaterial whether copies of such notice are sent to parties interested or not.

4. SAME—*admission—that proper notice was given.* The admission that a notice of the time and place for hearing objections to the classification of the lands, and the levy of special assessments for benefits, was duly published, addressed "to whom it may concern," in a weekly newspaper, for two successive weeks, and that a copy thereof was duly mailed, postpaid, to each land owner, will be sufficient to show notice to all persons required by law to be notified.

5. SAME—*jurisdiction—by notice.* The jurisdiction of the commissioners to make an assessment is derived by the publication of the notice required by section 60 of the act, and is not dependent upon the voluntary appearance of the parties in interest.

6. SAME—*lien for assessments—under act of 1885—constitutionality—nature of the lien.* The Drainage law of 1885, giving a lien for assessments superior to the liens of existing incumbrances, is not unconstitutional, as impairing the obligation of contracts or divesting vested rights. Every one holds his property subject to the exercise of the

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taxing power, regardless of the nature of his interest,—whether a fee, an estate in expectancy, an estate for years, or a mere lien.

7. The lien of a special assessment in a drainage district created under section 72 of the Drainage act of 1885, is not upon any special interest in the land, but upon the land itself,—that is, upon the *res*. The lien so given is of the same nature, and subject to the same general rules, as that given in case of general taxes.

8. SPECIAL ASSESSMENTS—*referable to the taxing power*. Special assessments are a species of taxation, peculiar in their nature, and subject to special rules, but the power to levy them is referable to the taxing power.

9. SAME—*pre-existing claims and liens—held subordinate thereto*. A lien of a special assessment, like the lien for taxes, attaches to the land itself, irrespective of the interests of the various owners, and is paramount to all other claims or liens against the property.

10. SAME—*sale of railroad for lien of assessments*. On bill to foreclose the lien of a special assessment upon the right of way and track of a railroad company, the right of way and track may be ordered to be sold for the satisfaction of the assessment.

11. SAME—*remedy to question assessment*. The statute having provided an adequate remedy, in case of an erroneous assessment, by appeal, that remedy must be held exclusive, and parties who have neglected to pursue it must be conclusively presumed to be satisfied with the assessment.

WRIT OF ERROR to the Circuit Court of Champaign county;
the Hon. C. B. SMITH, Judge, presiding.

Mr. THOMAS J. SMITH, and Mr. GEORGE B. BURNETT, for the plaintiff in error:

The pretended assessment did not become a lien upon the railroad property, because the owners of it were not named in the petition, and because notice was not given to them as provided in the Drainage act. The trustees were the owners. 1 Jones on Mortgages, secs. 709, 710, p. 576; Drainage law, secs. 11, 50; *Barrett v. Hinckley*, 124 Ill. 32; *Long v. Thompson*, 60 id. 27; *Railroad Co. v. Smith*, 78 id. 96.

The decree is erroneous, because it makes the lien of the assessment superior and paramount to the mortgages upon the property executed and recorded before the passage of the act

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authorizing the formation of drainage districts. *Cooper v. Corbin*, 105 Ill. 224; *Binkert v. Railway Co.* 98 id. 205; *Cook v. Commissioners*, 101 Ind. 446.

It is not within the constitutional power of the legislature to make the lien of the assessment for drainage purposes superior to the lien of a prior mortgage. The drainage commissioners are private corporations. *Harward v. Drainage Co.* 51 Ill. 130; *Hessler v. Drainage Comrs.* 53 id. 105.

Special assessments are not included within the meaning of the word "taxation." *Railroad Co. v. Decatur*, 126 Ill. 92; *McLean County v. Bloomington*, 106 id. 209; *Edward v. Kearzy*, 96 U. S. 595; *Green v. Biddle*, 1 Wheat. 1; *Planters' Bank v. Sharp*, 6 How. 301; *Billings v. Riggs*, 56 Ill. 483.

The decree is erroneous because it directs the sale and conveyance of a portion of the railroad. *Dun v. Railroad Co.* 24 Mo. 493; *Railroad Co. v. Parker*, 9 Ga. 377; *Cox v. Railroad Co.* 46 Cal. 18; *Knapp v. Railroad Co.* 74 Mo. 374; *Rorer on Judicial Sales*, sec. 1070.

The decree is erroneous because the assessment is in excess of the benefits to the railroad property. *People v. Meyers*, 124 Ill. 95; *Lipes v. Hand*, 104 Ind. 503.

Mr. FRANCIS M. WRIGHT, for the defendants in error:

The remedy against an erroneous assessment is by appeal alone. *Keigwin v. Drainage Comrs.* 115 Ill. 347; *Town of Colfax v. Commissioners*, 127 id. 581.

The owner of the equity of redemption is the owner of the land. *Ralston v. Hughes*, 13 Ill. 470.

The receiver is a trustee, and acts for all the creditors. He represents the corporation and its creditors. *Holich v. Folger*, 20 Wall. 1; *Express Co. v. Railroad Co.* 9 Otto, 191; *Davis v. Gray*, 16 Wall. 203; *Daggett v. Railroad Co.* 9 Otto, 72; *Gillett v. Moody*, 3 N. Y. 479; *Talmadge v. Pell*, 7 id. 347; *Libby v. Rosekrans*, 55 Barb. 217.

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Jurisdiction to act is obtained when the notice required by the statute is given, (*Commissioners v. Drainage Comrs.* 127 Ill. 581,) and when once obtained, no other notice is necessary as to any further steps. *People v. Chapman*, 127 Ill. 387; *Blake v. People*, 109 id. 504.

By the admissions it appears the special assessments were made in strict conformity with the statute, which appears on the face of the proceedings, and are therefore valid. *Chicago v. Wright*, 32 Ill. 192; *Chicago v. Railroad Co.* 20 id. 286.

A sale of land for taxes will pass the title regardless of any incumbrance. *Cooper v. Corbin*, 105 Ill. 224.

The lien for a special assessment continues until paid. *Brackett v. People*, 115 Ill. 29.

A lien for taxes does not stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res*, without regard to individual ownership. *Osterberg v. Trust Co.* 3 Otto, 424.

A proceeding *in rem* is directly against the property, and has for its object the disposition of the property, without reference to the title of the individual. *Pennoyer v. Neff*, 95 U. S. 714.

The jurisdiction is founded on the presence of the property, and is conclusive against the absent as well as the present contestant. *Parker v. Overman*, 18 How. 137; *Thomas v. Lawson*, 21 id. 331.

Possession of the *res* in the sovereign gives jurisdiction. *Hudson v. Guestier*, 4 Cranch, 293.

Whenever, by the laws of a State, or by State authority, a tax, assessment, servitude or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person or such proceeding in regard to the prop-

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erty as is appropriate to the nature of the case, the judgment in such proceedings can not be said to deprive the owner of his property without due process of law, however obnoxious it may be to other objections. *Davidson v. New Orleans*, 96 U. S. 97; *Hogan v. Reclamation District No. 108*, 111 id. 701; *Owners of Lands v. People*, 113 Ill. 314.

A law of a State having made water rents a charge on lands, with a lien prior to all other incumbrances, in the same manner as taxes and assessments, a mortgage on the land is subject to this condition and charge, whether the water was introduced on to the lot mortgaged, before or after the giving of the mortgage. *Provident Institution v. Mayor*, 113 U. S. 506.

Organization can be questioned only by *quo warranto*. *Blake v. People*, 109 Ill. 504; *Evans v. Lewis*, 121 id. 478.

The point made by counsel for plaintiff in error, that the decree is erroneous because it directs the sale and conveyance of a portion of the railroad, is met by the opinion of this court in *Illinois Central Railroad Co. v. Commissioners, etc.* 129 Ill. 417.

Mr. JUSTICE BAILEY delivered the opinion of the Court:

This was a bill in chancery, brought under the provisions of section 72 of the "Act to provide for drainage for agricultural and sanitary purposes and to repeal certain acts therein named," approved June 27, 1885, by the Commissioners of the East Lake Fork Special Drainage District against the Wabash, St. Louis and Pacific Railway Company and the Wabash Eastern Railway Company of Illinois, to foreclose the lien of a certain assessment for drainage purposes, upon that portion of what has heretofore been known as the Wabash, St. Louis and Pacific Railroad which lies within said district. The defendants appeared and answered, and a hearing being afterwards had on pleadings and proofs, a decree was rendered establishing said lien and awarding a sale of that portion of said railroad lying within said district for the payment of the

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same. The Wabash Eastern Railway Company of Illinois now brings the record to this court by writ of error and assigns various errors.

The facts, most of which are admitted by the pleadings or by the stipulation of the parties, are substantially as follows: The East Lake Fork Special Drainage District was duly organized under the provisions of the above mentioned act on the 9th day of August, 1886, embracing lands in three different towns in Champaign county. The main line of said railroad, which was built many years ago, runs through a portion of said district. On the 27th day of January, 1887, the commissioners, in classifying the several tracts of land in said district according to the benefits to be received from the contemplated drainage, determined that said line of railroad would receive one-eighth of said benefits, and made their classification accordingly, and filed the same in the office of the clerk of the County Court. Said commissioners thereupon appointed a meeting for hearing objections to said classification for the 14th day of February, 1887, and a notice, addressed "To whom it may concern," and stating the time, place and object of said meeting, was published by said clerk in a newspaper published in said county, and also mailed to each land owner, to the Wabash, St. Louis and Pacific Railway Company, and to Gen. John McNulta, the receiver of said railway company. At said meeting, said railway company, by its agent, and said receiver, by his agent, appeared and objected to said classification, and said commissioners, having heard and considered said objections, as well as all other objections presented, and being of the opinion that the classification of said railroad was too high, changed the same from one-eighth to one-sixteenth, and confirmed the classification as thus amended. No further steps were taken by said railway company or by said receiver, by appeal or otherwise, to have the final determination of said commissioners reviewed or modified.

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After said classification was confirmed, said commissioners ordered the sum of \$35,000 to be raised by special assessment upon the lands within the district to be benefited by the proposed drainage system, and said assessment being extended upon said lands upon the basis of said classification, the sum of \$2187 was assessed against that portion of said railroad within said district, and said assessment was afterward duly confirmed. Said district was also divided into sub-districts for the construction of lateral drains, and in one of said sub-districts the sum of \$18.20 and in another \$58 was assessed upon said railroad. These assessments were also confirmed, and no steps were taken by said railway company or by said receiver by appeal or otherwise to have said orders of confirmation reviewed. Said assessments were returned to the county collector delinquent March 10, 1888, and said collector, after giving due notice, applied to and obtained from said County Court, at its May term, 1888, a judgment against said railway for the amount of said special assessments. Said assessments remaining wholly unpaid, said commissioners, on the 21st day of June, 1889, filed this bill.

It is admitted that long prior to the passage of said Drainage Law, the entire line of railroad then owned by the Wabash, St. Louis and Pacific Railway Company, including that portion lying within said district, was incumbered by four deeds of trust, all of which were duly recorded in the office of the recorder of said county. Said incumbrances were all executed by said railway company, and were as follows: one bearing date May 1, 1863, to the Farmers' Loan and Trust Company of New York as trustee, to secure \$2,496,000; one bearing date May 2, 1865, to Solon Humphreys and James R. Jessup as trustees, to secure \$2,500,000; the third executed in February, 1867, to Isaac H. Knox and James R. Jessup as trustees, to secure \$2,610,000; and the fourth executed in May, 1879, to Solon Humphreys and D. A. Linsley as trustees, to secure \$2,000,000. In December, 1886, proceedings were

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instituted in the Circuit Court of the United States for the Northern District of Illinois to foreclose each of said deeds of trust, and by virtue of decrees of foreclosure therein, the property covered by said deeds of trust was sold May 15, 1889, and at said sale certain parties became the purchasers, who subsequently conveyed said property to the Wabash Eastern Railway Company of Illinois, the plaintiff in error.

It being insisted that the proceedings by virtue of which said district was organized, the lands therein classified and said assessment levied, were insufficient to make the assessment a lien on the railroad as against the plaintiff in error and the parties through whom it derives title, it is important to notice the precise nature and scope of the admissions in that behalf made by the plaintiff in error in its answer, and in the stipulation as to the facts, entered into by its counsel at the hearing. The bill having alleged the facts substantially as above set forth, the plaintiff in error answered, among other things, that it believed it to be true "that the East Lake Fork Drainage District was duly organized by proceedings in the County Court of Champaign county, Illinois, on the 9th day of August, 1886, under the provisions of an act of the General Assembly of the State of Illinois, entitled: 'An Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named,' approved June 27, 1885." Then, after admitting that the commissioners classified the lands in the district so as to impose one-eighth of the burdens upon the railroad, it answers that it believes it to be true "that said commissioners fixed the time for hearing objections to the assessment made by them for the construction of said ditch on the 14th day of February, 1887, and gave notice as required by law, and that said commissioners met at the time aforesaid to hear objections to said assessment," etc. The stipulation as to the facts entered into at the hearing is as follows:

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"It is admitted that the East Lake Fork Special Drainage District, of the county of Champaign, State of Illinois, was duly organized, by proceedings in the county court of Champaign county, Illinois, on the 9th day of August, 1886, under the provisions of an act of the General Assembly of the State of Illinois, entitled 'An Act to provide for drainage for agricultural and sanitary purposes, and to repeal certain acts therein named,' approved June 27, 1885; that said drainage district embraces lands in the towns of Scott, Colfax and Sadorus, in said Champaign county; that the Wabash, St. Louis and Pacific railway, known as the main line, runs through that portion of said drainage district located in the town of Sadorus, in said county, the drains of which railway connect with the drains of said district; that on the 27th day of January, 1887, the commissioners of said district, being of the opinion that in the construction of the work in said drainage district the railroad of the said Wabash, St. Louis and Pacific railway would be benefited where the main line passes through said district, did assess to such railroad such sum as they deemed just and equitable for such railroad to pay in proportion to the benefits received by reason of the construction of the main ditch in said drainage district, which sum was determined by estimating the amount of benefits to the entire district, including the benefits to such railroad, and also the benefits to such railroad, thereby producing the fractional figure of one-eighth, expressing the ratio between the sum of the benefits for the whole district and the sum found to be the benefit to said railroad, which said fractional figure of one-eighth the said commissioners then believed did express the proportionate part of the corporate taxes of the district to be paid by said railroad, which said figure was duly entered upon the table of classification of said district against the said Wabash, St. Louis and Pacific Railway Company, and said table duly filed in the office of the county clerk of said Champaign county, as required by law, on the 27th day of January,

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1887; and the said commissioners having fixed the time for hearing objections to said classification on the 14th day of February, 1887, at ten o'clock A. M., at the town hall in the village of Ivesdale, in the said county, the said clerk did thereupon, on the 27th day of January, 1887, issue notices of the said time and place of said meeting, and the object thereof, addressed 'To whom it may concern,'—which said notice was duly published in the '*Champaign Times*,' a weekly newspaper printed and published in said county, for two successive weeks, the first publication being more than fifteen days prior to said 14th day of February, 1887, and a copy of said notice was by said clerk duly mailed, postpaid, to each land owner and said railroad company, at his, her or its post office address, and to Gen. John McNulta, receiver of said railway company, at Chicago; and the said commissioners did meet at the time and place aforesaid, to hear objections to said classification, and by public announcement then and there made, did adjourn to February 15, 1887, at nine o'clock A. M., to the same place, when and where they met and completed their hearing of objections, and that the drainage record shows that at said meeting the agent of the receiver appeared and objected to said classification of said railroad, and also, so far as by law the agent of the receiver could bind the Wabash, St. Louis and Pacific Railway Company, he appeared and objected for said company, and the commissioners heard and considered said objection and all other objections, and did make such corrections and changes of said classification as in their judgment justice required; and being satisfied in certain cases, and in the case of said railway company, that injustice had been done by their said classification, did correct the same in accordance with the rights and justice of the matter, and did change the said figure of classification against said railway company from one-eighth to one-sixteenth, and duly noted such change on said table of classification, and did then confirm said classification as corrected, and on the 18th day of

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February, 1887, did file with the county clerk of said county their order confirming said classification as corrected,—which said order and the said classification were duly recorded in the drainage record in the office of said clerk, from which the said railroad company, or the receiver, took no appeal; that thereupon the said drainage commissioners did order the sum of \$35,000 to be raised by special assessment upon the property benefited by the proposed work in said district, and filed with the said clerk their certificate thereof, as required by law, which was duly recorded in the drainage record; and thereupon the said clerk did compute and apportion the various amounts to and among the several owners, as required by law, and the commissioners aforesaid did make out a tax list, signed by them, and filed on the 2d day of March, 1887, in said clerk's office, in which, among others assessed, the railroad of said Wabash, St. Louis and Pacific Railway Company is assessed for benefit in said district, on the basis of said fractional figure of said one-sixteenth and the said levy of said \$35,000, in the sum of \$2187,—which said tax list was duly confirmed, and from which no appeal was taken by said railroad company or said receiver, and the same was duly recorded in said drainage record; that said drainage commissioners, having divided said district into sub-districts for the purpose of constructing lateral drains therein, did, by like proceedings as hereinbefore described for the whole district, assess the railroad of said railway company for benefits, in sub-district No. 22 the sum of \$18.20, and in sub-district No. 25 the sum of \$58; that on the 10th day of March, 1888, the treasurer of said district returned the said assessment to the county collector of said county as delinquent, who, after due notice to the said railway company, did, at the May term of the county court of said county, 1888, apply for and obtain judgment as in cases of delinquent land; that the assessments were ordered paid, as the statute requires, but are not paid; that the track and right of way of said railway company in said district runs

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through sections 3, 4, 7, 8 and 9, town 17, range 7, in said county, within said district; that said district contains 17,500 acres."

The first contention of counsel is, that said assessment did not become a lien upon the railroad property because, as it is claimed, the owners of it were not named in the petition for the organization of the district, and were not notified of the proceedings thereunder. Their position is, that at the time of the organization of the district and of the levying of the assessment, the trustees in the deeds of trust and not the railway company were the real owners of the railroad, and that said trustees were not named in the petition or notified of the proceedings. It may be here remarked that, so far as counsel seek, in this collateral proceeding, to call in question the regularity of the organization of the district, their effort must prove unavailing. But even waiving that point, we are of the opinion that, in view of the facts established by the present record, their contention can not be sustained.

It is undoubtedly the rule in this State that for many and perhaps for most purposes, a mortgagee, especially after condition broken, is the owner of the fee. *Barrett v. Hinckley*, 124 Ill. 32. But whether he is to be deemed the "land-owner" within the meaning of the Drainage Law does not seem to be important in this case, since, in view of the admissions by which the plaintiff in error is bound, the contention now under consideration must be overruled, whichever way that question may be decided.

By glancing for a moment at the Drainage Act it will be seen, that the steps prescribed for the organization of a special drainage district are, in brief, as follows: There must be presented to the County Court a petition, signed by a certain proportion of the adult land-owners, stating that the lands lying within the boundaries of the proposed district require a combined system of drainage or protection from wash or overflow; that the petitioners desire that a drainage district

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be organized embracing the lands therein mentioned, for the purpose of constructing, repairing or maintaining a drain or drains, etc., within such district for agricultural and sanitary purposes, by special assessment upon the property benefited, and also giving the names of the owners of the several tracts of land, together with their post-office address, so far as known. The clerk of said court is then required to give at least twenty days' notice of the day in the term when the petition and all parties interested will be heard, by posting such notice in at least five public places in each township in which the proposed district or any part of it shall lie, and by publishing such notice for three weeks in a newspaper published in the county, and also by mailing at least ten days before the hearing, a copy of the notice to each person owning land of the district whose name, post-office address or place of residence is given and whose name does not appear signed to the petition. At the time set for the hearing, the court is required to examine the petition, and if it appear that it is signed and that notice has been given as required by the act, to so find. Opportunity is also given to any person owning land in the district and whose name is not signed to the petition to appear and controvert any material statement therein contained. If at such hearing the finding of the court is in favor of the petitioners, it becomes the duty of the court to appoint three commissioners who are required to go upon the land included in the proposed district and personally examine the same, employing an engineer and obtaining maps, plats, surveys and estimates if they see fit, and reporting the same to the court, with such recommendations as they see fit to make. The court is then required to fix a time for hearing their report, and upon such hearing, any owner of land within the district may appear in person or by attorney and be heard upon any and all questions touching such report and the organization of the district, and if it appears to the court that the lands included in the proposed district will be benefited for agricul-

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tural or sanitary purposes, it must so find, and enter an order declaring the district organized.

The record before us does not contain a copy of the petition for the organization of the district in question, nor does it show specifically whose names were signed to it, or who were named therein as land owners. Nor does it specifically show what proceedings were taken thereunder by way of organizing the district, or what notice was given or to whom. In the place of specific proof on these subjects, the bill alleges the due organization of the district under and in pursuance of the provisions of the Drainage Act, and that allegation is fully and unequivocally admitted by the plaintiff in error, both in its answer and in the stipulation made at the hearing by its counsel. An unqualified admission of the due organization of the district under and in pursuance of said act is an admission that all the steps necessary to a legal organization of the district were taken in manner and form as prescribed by said act, including the presentation of a petition giving the name and post-office address of each of the several land-owners, so far as known, and the giving, in the mode therein prescribed, of actual or constructive notice to all parties having any legal interest in the proceedings. If then the trustees in the deeds of trust were the legal owners of the railroad at the time the petition was presented, as counsel insist, it must be assumed, in view of said admissions, that they were named in the petition as land-owners, or that their names and post-office address were not known, and that the notice, either actual or constructive, required by said act, was given them.

Substantially the same thing may be said in relation to the proceedings taken by the commissioners subsequent to the due organization of the district, by way of classifying the lands within the district and of levying the assessment now under consideration. The admission in the stipulation is, that a time was fixed by the commissioners for hearing objections to said classification, and that a notice, addressed "To whom it

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may concern," stating the time, place and object of said meeting, was duly published in a weekly newspaper published in Champaign county for two successive weeks, the first publication being more than fifteen days prior to the day fixed for said hearing, and that a copy of said notice was duly mailed, postpaid, to each land-owner and said railway company at his, her or its post-office address, and also to Gen. John McNulta, the receiver of said railway company, at Chicago. It may be observed that the sixtieth section of the Drainage Act which prescribes the mode of giving notice in the matter we are now considering, only requires notice by publication, and it is therefore quite immaterial whether a copy of the notice was mailed to the trustees in the trust deeds or not. But even if that were required, the admission is that a copy of the notice was mailed to each land-owner, and if said trustees are to be deemed the owners of the railroad, the admission applies to them the same as to the other land-owners.

In view of what we have said, it does not seem important to determine whether the appearance of the agent of the receiver and of the railway company at the meeting and his objecting to the classification could affect the rights of the trustees, or of the plaintiff in error who has succeeded to their rights. The jurisdiction of the commissioners to make an assessment which should be binding upon the interests represented by the trustees was based upon the notice, either actual or constructive, the due service of which is admitted, and not upon the voluntary appearance of an agent representing the mortgagor or the receiver. The action of the commissioners would, under the facts admitted, have been equally valid, if there had been no appearance and no objections interposed.

The next proposition submitted by counsel for the plaintiff in error is, that the deeds of trust having been executed and recorded long prior to the assessment or to the passage even of the act by which the assessment was authorized, they constitute a lien superior to that of the assessment, and that the

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decree therefore is erroneous in declaring the lien of the assessment superior and paramount to that of the deeds of trust.

Section 72 of the Drainage Act provides that all assessments or levies thereafter made under the provisions of said act "shall be taken, held and considered a lien upon each and every tract of land or property assessed in such district, to the extent and amount of the proportionate share assessed or levied against the same." The lien thus created is not upon any specific interest in the land but upon the land itself, that is, upon the *res*. Special assessments are a species of taxation, peculiar in their nature it is true and subject to special rules. But the power to levy them is clearly referable to the taxing power. As said by Judge Cooley in his Treatise on Taxation, "That these assessments are an exercise of the taxing power has over and over again been affirmed, until the controversy must be regarded as closed." Cooley on Taxation, 623, and authorities cited in note. It follows that the lien given by the statute in case of such assessments is of the same nature and subject to the same general rules as that given in case of general taxes.

A lien of this character attaches to the land itself, irrespective of the interests of the various owners, and is paramount to all other claims or liens against the property. In *Ostenberg v. Union Trust Co.* 93 U. S. 424, which was a case involving a lien on land given by the revenue laws of this State, the court, in discussing the nature and extent of such lien, say: "It is true that the title of a purchaser at a judicial sale under a decree of foreclosure takes effect by relation to the date of the mortgage, and defeats any subsequent lien or incumbrance. A lien for taxes does not, however, stand upon the footing of an ordinary incumbrance, and is not displaced by a sale under a pre-existing judgment or decree, unless otherwise directed by statute. It attaches to the *res* without regard to individual ownership, and when it is enforced by sale pursuant to the statute, prescribing the mode of assessing

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and collecting the same, the purchaser takes a valid and unimpeachable title." So, in *Cooper v. Corbin*, 105 Ill. 224, this court said: "Taxes levied upon real estate become a charge upon the land itself, and if they are not paid, the land may be sold for the taxes due thereon, and the title will pass regardless of any incumbrance resting on the land." Again, in *Jack v. Wiennett*, 115 Ill. 105, we said: "The claim for the payment of taxes upon the citizen is, therefore, of necessity, paramount to all other claims against the property." In the light of these authorities, and upon principle as well, it must be held that the lien of the assessment in this case is superior to that of the deeds of trust, and that the Circuit Court was correct in so holding.

It is urged that the Drainage Law, so far as it attempts to give a lien for assessments superior to the liens of existing incumbrances, is unconstitutional because it violates the obligation of contracts or divests vested rights. This clearly can not be so. Every property-owner holds his property subject to the exercise of the taxing power, and it is immaterial, so far as this question is concerned, what may be the nature of his interest, whether the fee, an estate in expectancy, an estate for years or a mere lien. This is true, as every one must admit, in relation to general taxes, where the only return to the tax-payer is the protection and security which the government gives him, and *a fortiori* should it be true in case of special assessments where, in theory at least, he receives an adequate and complete return for the money assessed in the enhanced value of the estate or property which he owns or to which his lien attaches.

Again, it is urged that the decree is erroneous in directing a sale of a portion of the railroad for the satisfaction of the lien. This proposition was presented and considered in *I. C. R. R. Co. v. Commissioners of East Lake Fork Special Drainage District*, 129 Ill. 417, and it was there held that an order for the sale of the track and right of way of the railroad company

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within the district for the payment of the assessment was proper. We are still inclined to adhere to the conclusion to which we arrived in that case.

The last point raised is, that the assessment upon the railroad property is largely in excess of the benefits to said property arising from the proposed system, and that the decree sustaining the assessment is erroneous for that reason. A large amount of testimony was offered at the hearing as to the nature and amount of the benefits to the railroad, and the court was asked to consider that question as though it were an original question to be determined in this proceeding. The statute having provided an adequate remedy in case of an erroneous assessment by appeal, that remedy must be held to be exclusive, and parties who have neglected to pursue it must be conclusively presumed to be content with the assessment.

We are of the opinion that the decree is warranted by the evidence, and that there is no material error in the record. The decree therefore will be affirmed.

Decree affirmed.

WILLIAM ANEALS *et al.*

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield November 1, 1890.

1. CRIMINAL LAW—*alibi*—proof in respect thereto—reasonable doubt. Where the evidence of the presence of one charged with crime at a different place than that of the crime is not necessarily inconsistent with his having been present at the place when the crime was committed, as, where the accused might have been at both places, it will fail to establish the defense of *alibi*.

2. A jury must believe, beyond a reasonable doubt, from a consideration of all the evidence, that a defendant is guilty, including the question of an *alibi*, if that is involved in the defense, before they are justified in so finding; and an instruction on a question of an *alibi*, that

134	401
152	334
134	401
65a	615
67a	325

184	401
86a	216

184	401
191	*456

184	401
h206	*580

184	401
212	*489

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if, after considering all the facts and circumstances in proof, the jury had no reasonable doubt of the presence of the defendant at the place where the crime was committed, then the defense of *alibi* had not been made out, and was unavailing, is proper, and is not in conflict with the rule as to reasonable doubt.

3. *SAME—previous character of the accused—as an element to be considered.* On the trial of a party for an assault with intent to murder, the previous character of the accused is competent evidence to be considered by the jury on the question of guilt or innocence, and it is proper to be considered in mitigation of punishment. But the force of such evidence must always depend upon the nature and character of the inculpatory evidence.

4. *IMPEACHING A WITNESS—laying the foundation.* There is no error in refusing proof that a witness offered another witness a sum of money to testify to certain facts after he was informed that the supposed facts were not true, where no proper foundation has been laid in the examination of the witness thus sought to be impeached.

5. On the trial of parties for an assault with intent to murder, they called the foreman of the grand jury which found the bill, and asked him if a certain witness for the prosecution did not testify before that body to certain facts, and make statements named. There was no foundation laid for the evidence by calling the witness' attention to the time and place and the facts: *Held*, that the court properly refused the impeaching evidence sought to be given.

6. It is not proper to call a witness to contradict or impeach another witness in respect of matters occurring out of court, as, by showing that the latter had made some statement inconsistent with his testimony, unless the attention of the witness is first called to the time and place of the alleged statement, and he is afforded an opportunity for explanation in respect thereof.

7. On proof of the previous character of persons being tried for an assault with intent to murder, some of the witnesses said they had read a charge of poisoning horses by one of the defendants, which was first published after the defendants' arrest. The defendants then offered to prove that such charge was published at the instigation of H., a witness for the prosecution, which the court refused to admit: *Held*, proper, as no foundation had been laid for the evidence by the examination of H.

8. *SAME—recalling witness—to lay foundation to contradict him.* Ordinarily the court should allow a witness to be recalled for the purpose of laying the foundation to impeach him, by showing his statements out of court; but when the attention of counsel has been called to the rule, and a reasonable limit allowed to put the proper questions to the witness, the refusal of the court to allow the witness to be recalled is within the discretion of the trial court.

Brief for the Plaintiffs in Error.

9. *SAME—proof of collateral matters.* On the trial of three for an assault with intent to murder, the defendants called witnesses to prove their previous good character, who were asked by the State's attorney if they had ever heard of the assault of one of the defendants on a third party, and some of them stating that they saw that assault, the defendants offered to prove what did occur at the prior assault, which the court refused to allow: *Held*, that the proposed evidence was properly refused, as calling for collateral matters.

10. *SAME—feeling and disposition of the witness toward the party—as a test of credibility.* Where a witness testifies to a threat made by a defendant against the prosecuting witness, such defendant may be asked whether he and the witness were on friendly or speaking terms, as tending to show the improbability of his having made the threats to such witness. But the refusal to allow such question will not prejudice the defendant, if he is allowed to deny making any such statements to the witness.

11. As to matters purely collateral, when the party calls them out on cross-examination, he is bound by the answer of the witness, but not so in respect of matters relevant and material to the issue being tried. The feeling and disposition of the witness toward the party is, however, relevant and material; and on cross-examination it is competent to test the witness in respect to his feeling, and if he has not done acts or used expressions showing hatred or ill-will toward the party against whom he is testifying, and if he denies the same, to introduce contradictory evidence by way of impeachment.

12. *INSTRUCTIONS—should not be marked as for either party.* The practice of marking instructions for the one party or the other is pernicious, and should not be tolerated. They should go to the jury as the instructions of the court, without anything to indicate at whose instance given.

WRIT OF ERROR to the Circuit Court of Adams county; the Hon. WILLIAM MARSH, Judge, presiding.

Mr. JOHN H. WILLIAMS, and Mr. CHARLES M. GILMER, for the plaintiffs in error:

The verdict of the jury should be set aside when the evidence does not sustain it. *Marlatt v. People*, 104 Ill. 364; *Mooney v. People*, 111 id. 388; *United States v. Jackson*, 29 Fed. Rep. 503.

Improper remarks by the trial court in the presence and hearing of the jury should not be encouraged.

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The refusal of the court to permit proper questions to be asked witnesses, and answered by them on behalf of plaintiffs in error, was error. *Railroad Co. v. Pennell*, 110 Ill. 435; *Bressler v. People*, 117 id. 422; *Phenix v. Castner*, 108 id. 207.

The court should not have permitted improper questions to be asked witnesses by the prosecution.

The giving of an instruction at the instance of the People, purporting to have been given at the instance of the plaintiffs in error, was a clear error, and very damaging to plaintiffs in error.

The modification of instruction No. — by the trial court was calculated to prejudice the plaintiffs in error. *Chambers v. People*, 105 Ill. 409.

The giving of improper instructions at the instance of the People, against the objection of the plaintiffs in error, was error. *Mullins v. People*, 110 Ill. 42; *Leigh v. People*, 113 id. 372; *Davis v. People*, 114 id. 98.

Mr. GEORGE HUNT, Attorney General, for the People.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

At the May term, 1889, of the Adams circuit court, Francis Asbury Aneals, William Aneals and Louis Stormer were indicted for an assault upon James Knox with intent to commit murder. At the September term, 1889, the trial resulted in a verdict of guilty, fixing the term of Asbury and William Aneals, severally, at eighteen months in the penitentiary, and of the defendant Stormer at one year. A motion for a new trial was sustained as to Asbury Aneals, but overruled as to the other defendants, and they were severally sentenced on the verdict. They prosecute this writ of error.

The first contention is, that the verdict should have been set aside, because the proof failed to sustain it. No question is made that there is ample proof of the *corpus delicti*. The

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only question of fact is as to the identity of the persons who committed the assault.

On April 27, 1889, about eight o'clock in the evening, while James Knox and his family were at the supper table, two masked men entered the house, and saying only, "Hold," fired two shots at Knox from a revolver, each firing one shot, one taking effect in the nose of Knox, and the other missing him and passing out through a window. The assailants then backed out of the house, drew shut the door, and disappeared. There were present James Knox, his wife, Samuel Knox, (a brother of James,) Miss Agnes Laage and Miss Hattie Wible. The latter two had just arisen from the table. Miss Laage was within four feet, and possibly nearer, of the smaller of the two assailants. One of the assailants was considerably larger than the other. The larger one came in first, but the smaller stepped farthest into the room. Samuel Knox was ten or twelve feet from the door at which the assailants entered, which was on the south side of the room, winding the clock, which hung on the west wall of the room.

James Knox was unable to identify either of the assailants, and unable to give any description of them, except that the smaller of the two was a man from five feet six inches to five feet eight inches high, weighing one hundred and thirty or one hundred and forty pounds, "longish neck," shoulders not broad, but square. Miss Laage, who was nearer than the others, says that one was quite a little smaller than the other in size, build and height; that she noticed the eyes of the smaller one, particularly, through his mask. She also noticed that the hair of one of the assailants was dark and the other light. On the following Saturday morning this witness and others went to Aneals and Stormer's, to see if they could identify any one. She says that Stormer's build and size resembled very much the size and build of the smaller of the assailants. He had light blue eyes, and a peculiar stare about them "that I noticed particularly that night." She also

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states that the eyes were rather small, and through the mask they seemed rather round than oval. The larger of the two men had dark eyes and hair. Both wore light-brown or grey suits, and hats the same color. The larger one had a large hat, the other a small one. The larger one had square shoulders, was firmly built, and straight. She testified that the description of the larger one answers to that of William Aneals "very well." She was unable to recognize any one as the assailant, but testified that the two defendants, William Aneals and Louis Stormer, resembled the parties who made the assault. On the motion for a new trial she filed an affidavit stating that she did not believe the defendants were the assaulting parties, and did not intend to be so understood in giving her testimony.

Miss Wible was unable to identify any one, while she agrees with the other witness, in the main, as to the description of the persons who made the assault. Samuel Knox testified that he had known William Aneals from infancy, and was familiar with his size, form, and general appearance. He describes particularly the clothing and hats of the assailants, and says he saw William Aneals wear a hat like the one described by him, on May 6, in Quincy. He saw him clearly at the time of the shooting,—saw none of his face but his chin, and that resembled the chin of William Aneals. He testified that he thought he knew these men, and was satisfied from what he saw that William Aneals was one of them. On cross-examination of this witness much occurred that might very properly weaken the force of his testimony.

It is made to appear with reasonable certainty that no one came out on to the road or public highway in front of the house immediately after the shooting, but back of the house, near the hedge, it was found that two horses had been hitched, and an opening had been made through a rail fence, and that horses had passed through the same, going north. The rails had been recently let down, and horses led or rode over them.

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On the fence were found prints of horses' feet, and black and bay horse hair. The horse tracks led in the general direction of where Aneals and Stormer lived,—that is, northerly. One of the horses that made these tracks had two shoes behind and one in front. The other was shod in front, only. The large tracks were made by the horse having three shoes.

Knox lived on the east side of section 15. To go to Aneals' through the fields would be from a mile and a half to two miles north, and a half mile west. The witness Carroll had been at Ingraham's, substantially half a mile west from William Aneals', and was at the gate "at the corner," about two hundred yards from Aneals' house, where the road turns north to Bloomfield. At about 8:30 o'clock he saw two persons on horseback coming from the south, (and which would be from the general direction of Knox's,) going north. At the corner mentioned the riders turned east. He thought he recognized one of them as the defendant William Aneals, and called to him by name, but received no reply. He also thought that he recognized the horse next to him,—the larger of the two horses,—and it was, as he thought, the horse that William Aneals had shortly before that purchased of Louis Fogle. It was moderately dark, and the moon was not shining. These persons were riding in a "fair lope."

Two witnesses examined the horse tracks found near Knox's house and in the field. Subsequently the witnesses Carroll and Hunter examined William Aneals' horses, and found a large mare belonging to him, with two shoes behind and one in front, which Carroll testifies was the Fogle mare, and whose feet, they testify, "compared exactly" with the larger tracks found at the fence and in the field near Knox's house. One witness, at least, went to Asbury Aneals' barn, and found a horse shod in front and bare behind, the tracks of which were apparently the same as the tracks of the other horse found back of Knox's house and in the field. The horse hair found at the fence was of the same general color as the hair upon

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the legs of the two horses mentioned by the witnesses. On Thursday following the shooting, Carroll saw the Fogle mare at William Aneals', and the hair had been cut off of her legs,—when, however, does not appear.

The evidence shows, that a short time prior to the assault Asbury Aneals and James Knox had had some difficulty over local political affairs. Much ill-feeling seems to have been engendered at and before the caucus which nominated both of these men for office,—Aneals for supervisor, and Knox for assessor. Knox was elected and Aneals defeated. William Aneals is the son of Asbury. Louis Stormer lived near the Aneals, and at the time of the assault was in William Aneals' employ. About a week after the election, the witness Altenheim testifies, Asbury Aneals said, when it was remarked that Knox was elected, that "he would never serve." The witness Gould, who claims to have been present, corroborates the statements of Altenheim, which are denied by Aneals.

The defense was an *alibi*. In respect of the evidence, of which the foregoing is but an imperfect epitome, it must be said, the jury heard the descriptions given of the assailants,—particularly of the one alleged to have been Stormer,—and had the opportunity of comparing them with the defendants as they appeared on the trial; they saw the witnesses, could observe their demeanor, and thereby judge of the weight and credit due to each,—all of which is denied to us. If the description of the smaller of the two assailants, in connection with the other facts and circumstances proved, satisfied them, beyond a reasonable doubt, as to his identity, they were justified in finding him guilty. In respect of the defendant William Aneals, if they believed his identification by the witnesses Samuel Knox and Carroll was sufficiently certain, when taken in connection with the very strong circumstances proved tending to connect him with the commission of the offense, to remove all reasonable doubt as to his identity, they were likewise justified in their verdict, unless a reasonable doubt of

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the guilt of said defendants, or one of them, was created by the evidence of good character of the accused, and of that tending to prove an *alibi*. No motive in respect of the defendant Stormer is shown, unless it can be traced to the fact that he was the friend of and was working for the Aneals. In respect, however, of William Aneals, it can not be said that evidence of motive was altogether wanting. James Knox had declined to run for office on the ticket with Asbury Aneals, the father of William, and the brother of Knox had stated in open caucus that he was ashamed to have his brother run on the same ticket with Asbury Aneals. Both, however, ran, and Aneals was defeated and Knox elected. It seems that the former was much incensed. Knox was also a school director, and Asbury Aneals said to the witness Whitler that he wanted Knox out—he wanted “the scoundrel out.”

In view of the facts and circumstances proved, it can not be said that there was not sufficient evidence upon which to predicate a verdict of guilty, if the jury believed it to be true. And as to the *alibi*, it must be said, when the evidence is all considered, that the defense is not established; and the jury were, we think, justified in concluding that the presence of the plaintiffs in error at the store in Bloomfield at from about eight o'clock to about ten o'clock on the night of the assault, was not necessarily inconsistent with their being present at the time and place of the assault. Perhaps the weight of the testimony in support of the *alibi* is, that William Aneals came to Davis' store in Bloomfield about eight o'clock. Some of the witnesses for defendants, however, put it later, and that Stormer reached the store five to ten minutes later than Aneals. To illustrate: John Carlin came to the store between half-past seven and eight o'clock, and says: “I saw Aneals when he came in. I was there quite a while before he came in.” And further says: “To the best of my opinion it was somewhere about 8:30 when I first saw William Aneals at the store.” Henry Nedick, who was at Davis' store on the even-

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ing in question, was produced by the plaintiffs in error. He lived about three-fourths of a mile from Bloomfield. He says: "I looked at the clock before I went. It was just eight o'clock. It struck while I was looking." He then says he started with a little boy and walked to the store, taking about fifteen minutes' time. Aneals was then at the store, and Stormer came about ten minutes later,—which would indicate that Aneals had just arrived.

The difference of time of the coming of Aneals and Stormer, as shown by all the proof, would indicate that Aneals, as before said, had just arrived at the store, so that it is possible, if not quite probable, in view of all this testimony, that the arrival of Aneals was later than eight o'clock. The distance from Knox's house to Aneals', by the road that Carroll saw the parties mentioned by him coming, would be from two and a half to three miles, and from Aneals' to the store about three-fourths of a mile, and from Stormer's to the store but a few hundred yards. When the persons described by Carroll passed him, the horses were on a "fair lope." It is apparent that if these plaintiffs in error were escaping from the scene of their crime, but a very few moments would be required to cover these distances. It appears from the testimony introduced by plaintiffs in error, that they ate supper together at William Aneals' house, and Stormer's presence is unaccounted for by any evidence save that of plaintiffs in error, from that time until he reached the store, except from two to six minutes that he was at his father's, before walking the five or six hundred yards from his father's house to the store. It is also to be remembered, that no one at Knox's pretends to have looked at any timepiece, or to give any more definite statement of the time than that it was about eight o'clock. No data is furnished from which that conclusion is reached, and, taking into consideration the time intervening before any person left the house to send for a doctor, the time they were gone when they did go, and the distance traveled, in connection with the

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testimony of the physician that he was called at nine o'clock, started for Knox's fifteen minutes thereafter, and arrived there at about ten o'clock, or a few minutes later, it would seem to very clearly indicate that the assault might have been committed some time before eight o'clock. Some of the persons had just risen from the supper table, and Knox and his wife were still at the table when the assault occurred. On the one side, those witnesses who seemed to have looked at timepieces place the arrival at the store in Bloomfield later than eight o'clock, while on the other, no one pretends to have known the exact time of the assault. It is very clear that a half hour, or even less, would have sufficed for the commission of the offense and the arrival of the plaintiffs in error at the store in Bloomfield. We can not say, in view of this evidence and the circumstances proved, that there was necessarily such inability for the plaintiffs in error to commit the offense as would create a reasonable doubt of their guilt.

It is objected the court erred in not permitting the plaintiffs in error to show, by the witness Gould, that the witness Hunter offered him \$50 to testify to certain facts, after Hunter was informed that the supposed facts were not true. No foundation had been laid in the examination of Hunter, who was a witness for the People, and the evidence was therefore improper, and the court properly excluded it. For the same reason like questions asked of the witness Dudley and others were held to be improper, and objections thereto sustained. In like manner, the plaintiffs in error produced one Judy, who was foreman of the grand jury, and he was asked if Samuel Knox did not testify before the grand jury in respect of certain material matters in a particular way,—that is, as to whether or not he did not then state that he did not know and could not recognize either of the men making the assault, etc. No foundation whatever was laid in the testimony of Knox for the introduction of this testimony. And precisely the same is true in respect of the offered testimony of the witness Pur-

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cell and others. No good purpose can be subserved by noticing these objections in detail. They all rest upon the same basis, and the ruling of the court was for the same reason proper. It is not proper to call witnesses to contradict or impeach a witness in respect of matters occurring out of court, as, by showing that he has made some statement out of court inconsistent with his testimony, unless the attention of the witness is first called to the time and place of the alleged statement or declaration, and he is afforded an opportunity for explanation in respect thereof. This rule is so familiar as to require the citation of no authorities in its support.

Numerous other objections are made in respect of the rulings of the court on the introduction of testimony, some of which may properly be considered.

The defendants produced a large number of witnesses who testified to the previous good character of the defendants,—some to all, and others to one or more of them,—of whom the State's attorney inquired if they had not heard of an assault by Asbury Aneals (who, it will be remembered, was also on trial,) upon one Sigsby, and whether they had not heard of his being accused of poisoning Sigsby's horses. Some of these witnesses stated they had heard of the supposed assault on Sigsby, and others that they had seen the occurrence. Thereupon counsel for defendants insisted upon their right to have the witnesses state what did occur between Aneals and Sigsby, to which the court sustained an objection, and, we think, properly so. To have permitted the witnesses to detail what occurred at that time, would have necessitated a trial of a purely collateral question. Trials would become interminable. It may be safely stated that there is neither reason nor authority for the position of counsel.

Some of the witnesses said they had heard of the charge of poisoning, after the assault in this case,—that it was first published in a newspaper in Quincy, after the arrest of the defendants. The defendants then offered to prove that it was

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published at the instigation of the witness Hunter, to which objection was made, and the objection sustained. No foundation had been laid in the examination of Hunter for this character of proof. Moreover, the testimony in respect both of the assault and poisoning related only to the defendant Asbury Aneals. In no way was the defendant William Aneals or Stormer connected with either of said matters, or the rumors in respect thereof. In no event would it be error of which they could complain.

We are of opinion that it would have been proper to have permitted the defendant Asbury Aneals to answer as to whether he and the witness Altenheim were on friendly or speaking terms at the time referred to by Altenheim, when he says Aneals said that Knox would never serve as assessor, as tending to show the probability or improbability of his having made the statement imputed. But the defendants received the full benefit of Asbury Aneals' denial of the statement attributed to him, and his testimony could not have been made stronger by this additional statement. It is impossible that the defendants could have been prejudiced by this ruling.

It is urged with great pertinacity that the defendants should have been permitted to show, as a substantive fact, that the witness Hunter had ill-feeling and hatred towards the defendants, and was actuated by corrupt motives. The witness Hunter admitted, on his cross-examination, that a reward of \$1000 had been offered for the arrest and conviction of the assailants, and he was then asked, "Is it not a fact that your interest in it was of the money reward which was offered," and he answered, "Of course, if I get the right parties,—if I get the right parties I expect to get the reward." He then testified that he had no ill-feeling toward any of the defendants, that he had not talked slightly or bitterly about them, had not called them names, or used expressions of that kind. He was asked if he had not made such statements to Colburn, and said no.

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As to matters purely collateral, where the party calls them out on cross-examination, he is bound by the answer of the witness. But not so in respect of matters relevant and material to the issue being tried. The feeling and disposition of the witness toward the party are held to be relevant and material, and on cross-examination it is competent to test the witness in respect of his feelings, and if he has not done acts or used expressions showing hatred or ill-will toward the party against whom he is testifying, and, if he denies the same, to introduce contradictory evidence by way of impeachment. (1 Greenleaf on Evidence, sec. 450; *Phenix v. Castner*, 108 Ill. 207, and authorities cited.) But the rule in respect of the contradiction of the witness in such matters is the same as in respect to any other matters material and relevant to the issue. Before witnesses can be called to show that statements have been made out of court inconsistent with those testified to at the trial, it is necessary, as before said, to lay the proper foundation, by calling his attention to the time, place and person involved in the supposed contradiction. Then, if he denies having made the declaration or done the act imputed, the contradictory evidence becomes proper. This we understand to be the uniform practice, and to which we are not aware of any exception. (1 Greenleaf on Evidence, sec. 462; *The Queen's case*, 2 Brod. & Bing. 313; *Conrad v. Griffy*, 16 How. 38.) As before stated as respects the witness Purcell and others, so in respect to the witnesses Colburn and Gould, no proper foundation was laid for the offered testimony, although the attention of counsel was called, during the examination of Hunter, to the necessity therefor, by the court, and of which they now complain.

In view of the fact that the court called the attention of counsel to the omission, and the many interrogatories put to Hunter upon the subject of his feelings, we can not say that it was an abuse of the discretion lodged in the court to refuse to permit Hunter to be recalled, for the purpose of laying the

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foundation for the introduction of other and different matters, or statements alleged to have been made at other times and places. Hunter had been asked respecting a statement at Colburn & Baker's store, and if he had not used certain language. The witness testified that he had not used that language, but that in a conversation before Urban's saloon something had been said by Hunter. Upon objection being sustained, defendants asked to recall Hunter, to lay the foundation for the conversation at Urban's saloon, which the court refused to permit. Ordinarily the discretion should undoubtedly have been exercised. But, as before said, a reasonable limit had been allowed. The attention of counsel had been called to the rule, which they seemed to regard as an unjustifiable interference on the part of the court, and we can not say that there was any abuse of discretion.

We have thus carefully gone through the evidence, and the many objections urged, for the reason that the case is close in some respects, and if any error had intervened prejudicial to plaintiffs in error, or that might have unduly prejudiced them before the jury, however slightly, we should have been disposed to reverse the judgment.

The character of plaintiffs in error previous to this charge was shown by a greater or less number of witnesses to have been good, and such evidence was competent to be taken into consideration by the jury in determining their guilt or innocence. The probative force of such evidence in each case must always depend upon the nature and character of the inculpatory evidence; and it may, and no doubt often does, of itself, properly create such a reasonable doubt in the minds of the jury as will justify an acquittal. But it is to be remembered, that the weight to be given to the evidence is peculiarly within the province of the jury, and unless we can say that the finding is palpably wrong, we ought not to interfere upon the facts, alone. This we can not say in this case. Not only may the jury consider the evidence of good character upon

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the question of guilt, but if they feel constrained to find the defendant guilty, it is proper to consider the same in mitigation of punishment,—and it would seem that the jury have done so in this case.

The jury were fairly and fully instructed as to the law of the case, to which there is no material objection urged. Objection, however, is made to an instruction given for the People. The objection is, “that the reasonable doubt in each of them ought to be as to the guilt of the defendants.” The criticism is not warranted. The instruction relates to the question of *alibi*. The jury must believe, beyond a reasonable doubt, from a consideration of all the evidence, that the defendants are guilty, before they would be justified in so finding. But these instructions did not relate to the question of guilt or innocence, strictly. By them the jury were told, in effect, that if, after considering all the facts and circumstances in proof, they had no reasonable doubt of the presence of plaintiffs in error at the house of Knox at the time of the assault, then the defense of *alibi* had not been made out, and was unavailing. The instructions were entirely proper, and not in conflict with the rule stated.

It is also objected that one of the People’s instructions was marked “For defendants,” and it is urged that some inference might be drawn therefrom by the jury different from what would have been drawn had it been properly marked “For the People.” The contention is without merit. The practice of marking instructions for the one side or the other is pernicious, and should not be tolerated, if thereby inferences are to be drawn by the jury. The instructions should go to the jury as the instructions of the court, and the better practice is, to have nothing appearing on the instructions showing at whose instance they are given. But there is nothing here that in any way indicates that any inference prejudicial to the plaintiffs in error was drawn by the jury, or that such could have been the effect. The instruction itself relates to what was

Syllabus. Brief for the Appellant.

proper for the jury to take into consideration in considering of their verdict, and was eminently proper to have been given at the instance of either party, or by the court itself, on its own motion.

We are of opinion that no substantial error has intervened appearing upon this record. The judgment of the circuit court must be affirmed.

Judgment affirmed.

AMANDA A. WARD

v.

THOMAS J. WARD et al.

Filed at Springfield November 1, 1890.

1. *WILLS—"election" by the widow—defined.* The term "election" implies a choice between different things. It is therefore impossible for a widow to make an election under a will when it gives only that which without it would pass to her by operation of law.

2. *SAME—declaration of acceptance—by widow—its effect.* Subsequent to the probate of a will, the widow of the testator executed a writing, to the effect that she thereby released and relinquished all her right of homestead, dower and widow's award under the statute, and elected to take the legacy given her by the will: *Held*, that this writing was no conveyance of anything, and, being purely voluntary, could not be enforced.

3. *SAME—renunciation by the widow—estoppel.* A widow will not be estopped from renouncing the will of her husband when the other devisees do not appear to have been injured by her renunciation, and where she has received nothing under the will that she would not otherwise have taken under the law.

APPEAL from the Circuit Court of Montgomery county; the Hon. J. FOUKE, Judge, presiding.

Mr. AMOS MILLER, and Mr. T. M. JETT, for the appellant:

There is no abandonment, waiver or conveyance of the homestead by the appellant. A release is not binding unless

Brief for the Appellees.

acknowledged as deeds are. Rev. Stat. chap. 52, sec. 4; *West v. Krebaum*, 88 Ill. 263; *Trustees v. Hovey*, 94 id. 394; *Johnston v. Dunavan*, 17 Bradw. 59.

Before assignment, the widow can only release her dower to the owner of the fee. In this case, the release does not show to whom it is made, and there was no consideration for it. *Hoots v. Graham*, 23 Ill. 81; *Hull v. Glover*, 126 id. 122; *Best v. Jenks*, 123 id. 447.

When the interest of the husband has been divested, by process of law or otherwise, (here, by death,) the wife may convey her dower, but the deed must be duly acknowledged and properly certified, as required by the statutes. Rev. Stat. chap. 30, sec. 16; *Bute v. Kneale*, 109 Ill. 652.

The statute gives the widow the right, within one year, to file her renunciation under the will. From the moment the will is probated the law elects for her, unless she sees fit to exercise her right to file her renunciation. If she does nothing within the year, the law fixes her rights, and elects for her to take under the will. Can she, by an act, change her rights when the law fixes her rights without any act on her part? She is, by the express terms of the statute, deemed to have elected to take under the will, if she fails to pursue the mode which the statute points out, within one year. Rev. Stat. chap. 41, secs. 11-13.

There can be no estoppel, for the reason no one has been injured by the widow's acts. *Herman on Estoppel*, p. 514, secs. 545, 546.

Mr. D. H. ZEPF, and J. M. TRUITT, for the appellees:

Before assignment, a widow can release her dower only to the owner of the fee. *Blain v. Harrison*, 11 Ill. 384; *Summers v. Babb*, 13 id. 483.

If a married woman joins with her husband, by signing a deed, properly acknowledged, she thereby releases and extinguishes her right of dower, although she does not thereby re-

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lease her right of homestead, because her name is not in the body of the deed. *Ayers v. Hawks*, 1 Bradw. 600; *Johnson v. Montgomery*, 51 Ill. 185.

Wherefore, her deed, in such cases, does not operate by the way of grant of any title, but by way of estoppel, so that the words of release on her part are as effectual as any words of grant. *Stearns v. Swift*, 8 Pick. 532; *Learned v. Cutler*, 18 id. 9; *Dundas v. Hitchcock*, 12 How. 256; *Malloney v. Horan*, 49 N. Y. 111.

A devise to a widow, of any interest in land, will bar her dower. *Jennings v. Smith*, 29 Ill. 116; *Brown v. Pitney*, 39 id. 468.

An election may be determined by matter *in pais* as well as by matter of record, but it can only be by plain and unequivocal acts, under a full knowledge of all the circumstances and of a party's rights; and a bare acquiescence, without a deliberate and intelligent choice, will not be an election. *Duncan v. Duncan's Exrs.* 2 Yeates, 302; *Cauffman v. Cauffman*, 17 S. & R. 16; *Bradford v. Kent*, 7 Wright, 474; *Anderson's Appeal*, 12 Casey, 476; *O'Driskoll v. Kager*, 2 Dessaus. 295.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This appeal brings before us for review the decree of the circuit court of Montgomery county dismissing the bill in a suit therein, wherein Amanda A. Ward, widow of Thomas R. Ward, deceased, is complainant, and William R. Ward, Thomas J. Ward and Sarah Sanders are defendants, praying that a trust be decreed in favor of the complainant in a certain 26 $\frac{3}{4}$ acres of land, and that homestead be set off and dower assigned to her in other lands whereof Thomas R. Ward died seized.

The evidence utterly fails to establish a trust in the 26 $\frac{3}{4}$ acres of land, as alleged in the bill, and to show any other

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ground entitling appellant to equitable relief in respect thereto, and we deem it unnecessary to say more in that respect. The only question fairly presented by the record is, whether appellant is, by the facts in evidence, estopped from saying that she has renounced the devises and bequests to her in the last will and testament of Thomas R. Ward. That instrument was admitted to probate on the 15th of August, 1888. On the next day appellant executed the following instrument:

"STATE OF ILLINOIS, }
Montgomery County. } ss.

"I, Amanda A. Ward, widow of Thomas R. Ward, deceased, do hereby release and relinquish all my right of homestead, dower and widow's award under the statute of this State, and I do hereby elect to take the legacy given me by the will of my late husband, Thomas R. Ward, deceased.

"Witness my hand and seal, this 16th day of August, A. D. 1888.

AMANDA A. WARD. (Seal.)"

She also, at the same time, executed a receipt for certain articles in the appraisement bill which she selected and took. On the 24th of January, A. D. 1889, appellant executed, and filed in the proper office, a renunciation of the provisions in the will in her favor, in the form prescribed by section 13, chapter 41, of the Revised Statutes of 1874.

The will gives the real estate whereof the testator died seized, in distinct tracts described, in severalty, to the three defendants, respectively, upon condition that they pay the testator's wife, (appellant,) during her life, one-third of all the hay, pasture, grain, fruit, etc., raised on the land, and the use of one-half of the dwelling house and garden, and also two cows, three hogs, and household and kitchen furniture as she shall direct; and it recites that J. W. Sanders, who is the husband of Sarah Sanders, is indebted to the testator in the sum of \$100, for about $7\frac{1}{2}$ acres in the $26\frac{2}{3}$ acre tract wherein appellant claimed a resulting trust, purchased by him of the tes-

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tator, and it directs that said Sanders pay \$25 of that amount to the complainant.

The evidence shows that appellant received all of the articles of personal property bequeathed to her before she executed the renunciation, and also payment of the \$25 from J. W. Sanders; that she divided the house and the garden with Thomas J. Ward, and took exclusive possession of one-half only, as directed by the will; and there is evidence tending to show that she has received the produce of the lands, as provided by the will, since the filing of her bill. We are unable to perceive, here, evidence of anything received by appellant which she could not have received had no will been made. The value of the specific articles selected and taken by her is shown to be only \$74.25, while the value of the specific articles to which she is entitled under the statute is proved to be \$743, showing that she might have received much more than she has received, without any will. The term "election" implies a choice between different things, and it is therefore impossible that there can be an election where the will gives only that which, without it, passed by operation of law to the party.

The evidence here fails to show grounds for an estoppel, because it does not appear that appellees have been injured by the act of appellant. There can be no pretense that the instrument signed by appellant on the 16th of August was a conveyance of anything. It was intended only as evidence that appellant had taken under the will; but since it was purely voluntary, it can not be enforced.

The decree of the court below is reversed, and the cause is remanded for further proceedings consistent with this opinion.

Decree reversed.

Syllabus.

PRENTISS D. CHENEY

v.

JAMES W. PATTON *et al.**Filed at Springfield November 1, 1890.*

1. **PLEAS IN CHANCERY**—*of the strictness required.* The same strictness and exactness are required in pleas in a suit in equity that are required in pleas in actions at law,—if not in matters of form, at least in matters of substance.

2. **SAME**—*general requisites.* A plea in chancery should clearly and distinctly aver all the facts necessary to render it a complete equitable defense to the case made by the bill, so far as the plea extends.

3. Where the allegations of the plea, being taken as true, do not, so far as it purports to go, make out a full and complete defense, or when the necessary facts are to be gathered by inference alone, the plea will not be sustained. It must be specific and distinct, and must be perfect in itself, so that, if true, it will make an end of the case, or of that part of the case to which it applies.

4. **SAME**—*sufficiency of plea of a former decree in another suit.* On bill by the mortgagee to foreclose, a plea of a decree in bar in a prior suit on the same notes and mortgage dismissing the bill brought by one claiming to be the assignee of the mortgage debt, is deficient in matter of substance if it fails to show that the prior suit was prosecuted at the mortgagee's instance, or with his knowledge and consent, and in his interest or for his benefit, or that there is, or ever has been, a privity in respect to the notes and mortgage between the several complainants in the two suits.

5. **FORECLOSURE**—*junior mortgagee not a party—of his rights after decree under prior mortgage.* Unless the holder of a junior mortgage is made a party to a suit to foreclose a senior mortgage, the decree of foreclosure therein will not bar his rights or his equity of redemption.

6. **FORMER ADJUDICATION**—*upon whom binding—as to one not a party to the suit.* Where a suit in chancery is prosecuted by one at the instance of another, who is the real party in interest, and for his benefit, then the adjudication will be binding and conclusive upon the latter, not only as to what was determined in the suit, but also in respect of all other matters properly involved, and which might have been presented and determined.

* WRIT OF ERROR to the Circuit Court of Sangamon county; the Hon. JAMES A. CREIGHTON, Judge, presiding.

134	422
142	195
144	374
145	535
134	422
64a	339

134	422
201	329

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On August 10, 1885, Prentiss D. Cheney, the plaintiff in error, filed in the Sangamon circuit court a bill to foreclose two mortgages made to him on seventy acres of land in Sangamon county, and on the north-east quarter of section 5, in township 12, north, range 6, west of the third principal meridian, in the county of Macoupin, that were executed in 1877 by Andrew Rauch and wife, for the purpose of securing certain promissory notes made by said Rauch, and payable to said Cheney. Said Rauch and wife, and James W. Patton and wife, and others, were made parties defendant to this bill. The defendants James W. Patton and wife answered the bill, and also filed a plea. The plea was interposed only to so much and such part of the bill as sought the foreclosure of the mortgages as to the said north-east quarter of section 5.

The allegations of the plea, so far as it is necessary here to recite them, were in substance as follows: "That on the 24th day of May, A. D. 1880, one Henry J. Smith, as assignee and holder of the notes and mortgages in complainant's bill mentioned, from the complainant, exhibited his bill of complaint in the circuit court in the county of Macoupin, State of Illinois, against the defendants herein, for the foreclosure of said mortgages in satisfaction of said promissory notes, thereby stating that each and all of said notes, with the said mortgages, had been duly assigned and transferred to him, the said Henry J. Smith, by the said complainant, Prentiss D. Cheney, before the maturity of said notes, for a valuable consideration, and the same were then held and owned by him, the said Smith; * * * that on the 22d day of September, A. D. 1880, said bill of complaint of the said Henry J. Smith was amended, by leave of court, setting up that at the time of the execution of said notes and mortgages the above described premises were subject to a prior mortgage to one O. B. Heaton, then deceased, which had been foreclosed, and that the premises aforesaid had been sold under said foreclosure decree, and that this defendant, James W. Patton, as judgment creditor

Statement of the case.

of said Andrew Rauch, had redeemed the same from said sale, and that this defendant, James W. Patton, held a deed to said premises for the amount paid by him to redeem the same, as aforesaid, no more than the amount of such redemption money having been bid therefor at his sale under such redemption, and praying that he, the said Smith, might be permitted to redeem said premises from the sale or sales made in pursuance of said decree of foreclosure, and that the said deed from the sheriff of Macoupin county, aforesaid, for said premises, might be for naught held, and that said mortgages be foreclosed,—to which bill as amended, filed as aforesaid by the said Henry J. Smith, in the said circuit court of the county of Macoupin, State of Illinois, this defendant, James W. Patton, on the 4th day of October, A. D. 1880, put in his answer, denying that said notes and mortgages were in good faith, for a valuable consideration, assigned and transferred by the complainant herein to the said Henry J. Smith, as alleged in the said bill of complaint of said Smith, and stating that this defendant, James W. Patton, was the owner in fee simple of the above described premises, that he held his title thereto free of and discharged from all liens that may have existed by virtue of said mortgages, and that he derived his title thereto in the following manner, to-wit: On the 31st day of October, A. D. 1870, the said Andrew Rauch, and his wife, Margaret E., executed to one Orange B. Heaton a mortgage on said premises, to secure a note for \$3000, due two years from that date; that on the 24th of May, 1877, the executors of Heaton's will filed their bill to foreclose said mortgage, in the circuit court of Macoupin county; that a decree of foreclosure was rendered at the August term, A. D. 1878, of said court; that on the 16th day of November, A. D. 1878, said land was sold under said decree, to said executors, for \$1120.86; that they received a certificate of purchase, which was for a valuable consideration assigned by said executors to the said Prentiss D. Cheney, mortgagee of the said mortgages described and set forth in

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complainant's bill, before the expiration of twelve months from the said day of sale; that the said Prentiss D. Cheney was a party defendant to the said foreclosure suit of said executors, and that neither said Cheney nor the complainant redeemed said premises from the sale aforesaid within twelve months after said sale; that on the 31st day of May, A. D. 1877, one Edmund C. Vancil recovered a judgment against the said Andrew Rauch and others, in the circuit court of Sangamon county, Illinois, for \$1425.05, and costs of suit; that on the 12th day of August, A. D. 1879, said judgment remaining unsatisfied, was duly assigned, for a valuable consideration, to respondent James W. Patton; that on the 21st day of November, 1879, execution to the sheriff of Macoupin county was issued on said judgment; that no redemption from said sale having been made by the said Andrew Rauch, his assigns, or any person interested in said premises through him or under him, within twelve months from said sale, respondent James W. Patton, on the 22d day of November, A. D. 1879, placed said execution in the hands of said sheriff to execute the same, who endorsed upon the back thereof a levy of the premises above described, and made a certificate of said levy, and filed the same in the recorder's office of said county; that on the said last mentioned day, respondent James W. Patton paid to said sheriff the amount for which said premises were sold, with interest thereon at the rate of ten per cent per annum from the date of said sale, for the use of the purchasers of said premises at said sale, or their assigns, whereupon said sheriff made, and filed in the recorder's office, a certificate of the redemption of said premises from said sale, and advertised the same for sale on the 18th day of December, A. D. 1879, when he offered said premises for sale at the time and place and on the terms advertised, and there being no greater amount bid at said sale than the redemption paid by respondent James W. Patton, with interest thereon at the rate of eight per cent per annum from the date of said

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redemption to the said day of sale, the premises were struck off to respondent James W. Patton, and the said sheriff thereupon executed and delivered to respondent James W. Patton a deed for said premises, which was filed for record in said recorder's office on the 18th day of December, 1879, and denies the complainant is entitled to relief as to the respondent James W. Patton,—to which said answer the said complainant, Henry J. Smith, filed his replication; and the said cause afterward, and on or about the 10th day of May, A. D. 1884, (that being one of the days of the February term, A. D. 1884, of said circuit court of Macoupin county,) came on to be heard, and a decree was then pronounced and approved by said court, allowing the said Henry J. Smith, the complainant therein, to redeem from the sale under the decree foreclosing the Heaton mortgage, and from the sale made on the 18th of December, 1879, under execution in the case of *E. C. Vancil v. Andrew Rauch and others*, made in pursuance of the redemption effected by defendant James W. Patton, as judgment creditor, by assignment of said judgment on November 22, 1879, upon complainant's paying \$1238.31,—the amount for which said lands were sold,—to respondent James W. Patton, on his redemption from the sale under said decree in said case of *Heaton et al. v. Rauch et al.*, with interest from the 22d of November, 1879, at the rate of eight per cent per annum; ordered the payment by Andrew Rauch of \$10,889.22 to complainant, for use of Bowman & Ware, and in default that the premises in question, and other lands in Sangamon county, be sold to satisfy said decree, and ordered appeal to be allowed to James W. Patton upon his giving bond in \$500, to be approved by the clerk, in sixty days from date of decree; and this defendant James W. Patton afterwards, to-wit, on the 23d day of May, A. D. 1884, appealed said cause to the Supreme Court of the State of Illinois, at the June term, A. D. 1884, of the Central Grand Division thereof, and that at the January term, A. D. 1885, of said Supreme Court, said decree of said circuit court was,

Statement of the case.

by the judgment of said Supreme Court, reversed, and said cause was remanded, with direction to the said circuit court to dismiss said bill so far as related to the said north-east quarter of section five (5), township twelve (12), north, range six (6), west of the third principal meridian, in the county of Macoupin, State of Illinois, and that on the 29th day of June, A. D. 1885, said cause was duly reinstated in said circuit court, upon notice to the solicitors of the said Henry J. Smith, as required by law, and a decree was made therein dismissing said bill so far as it related to said above described quarter section of land, pursuant to the judgment of said Supreme Court, as aforesaid;—all of which matters and things these defendants doth aver and plead in bar to so much of the said complainant's bill as hereinbefore particularly mentioned, and pray the judgment of this honorable court whether they should make any further answer to so much of the said bill as is before pleaded unto."

Plaintiff in error filed exceptions to certain portions of the answer put in to the residue of the bill of complaint, and on his motion the plea was set down for a hearing as to its sufficiency. On February 22, 1886, the court overruled the exceptions to the answer, and, upon argument, allowed the plea. No replication was filed to the plea, but on February 23, 1886, plaintiff in error, by leave of the court, amended his bill. On February 25, 1886, the defendants James W. Patton and wife demurred to the amended bill of complaint, and on April 11, 1888, said demurrer was sustained. Thereafter, on January 5, 1889, plaintiff in error presented to the court two proposed further amendments to the bill of complaint, and moved the court for leave to file the same, and on January 25, 1889, the court denied said motion, and refused to allow said proposed amendments to be filed. On March 2, following, the court entered an order and decree, wherein was recited the filing of the plea and answer of the defendants James W. Patton and wife, the allowance of said plea upon argument, the filing, by

Brief for the Plaintiff in Error.

leave of the court, of an amended bill, the filing and sustaining of a demurrer thereto, and the interposition and denial of the motion to file the proposed further amendments to the bill. And said order and decree then concluded as follows :

"And the complainant neglecting and failing to reply to said plea, and abiding by his said motion, now, therefore, on consideration thereof, it is ordered, adjudged and decreed, and the court doth order, adjudge and decree, that the complainant's original and amended bills of complaint be and the same are hereby dismissed as to the defendants James W. Patton and Francine E. Patton, and also as to the north-east quarter of section five (5), in township twelve (12), north of range six (6), west of the third principal meridian, in the county of Macoupin, State of Illinois, with costs to said defendants James W. Patton and Francine E. Patton to be taxed."

The present writ of error brings the record to this court, and various errors are assigned. The matters contained in the original bill, in respect to the connection of the defendant in error James W. Patton with the premises in controversy, the matters contained in the amendments to said bill, and the matter contained in the further proposed amendments which the court refused permission to file, are sufficiently stated in the opinion.

Mr. JOHN M. PALMER, and Mr. THOMAS F. FERNS, for the plaintiff in error :

The decree in *Smith v. Patton* did not conclude the rights of Cheney, as he was not a party to such suit.

The amended bill sets forth sufficient facts to entitle the complainant to relief, in equity. The bill also alleges collusion between Patton and his client, Rauch, to injure, delay and defraud Cheney in the collection of his debt. The law will not permit an attorney to thus purchase his client's land to the injury of his creditors. *Wright v. Walker*, 30 Ark. 48; *Hall v. Hallett*, 1 Cox, 134; *Bussy v. Hardin*, 2 B. Mon. 410; *Pearle v. Gamble*, 72 Ala. 343; *Moore v. Braken*, 27 Ill. 23.

Brief for the Plaintiff in Error.

The allowance of a plea to a part of a bill, generally, imposes upon the plaintiff the necessity of amending his bill. If a plea for the whole bill is allowed, it puts an end to the suit; but the court, when the case requires, will, instead of allowing the plea, give the plaintiff leave to amend. 1 Smith's Ch. Pr. 237.

The amendment of a bill in chancery by the complainant, and an answer, plea or demurrer filed to said amended bill, operates as a waiver of the prior proceedings. 1 Smith's Ch. Pr. *305.

In the case of *Bassett v. Company*, 43 N. H. 253, the court says: "If, then, the plaintiff find the plea true, in fact, he must not reply, but he may amend his bill, and thus avoid its effects, as was done in this case to avoid the first plea."

Amending the bill after plea is not allowance of the plea. Cooper's Eq. Pl. 334; Story's Eq. Pl. (7th ed.) sec. 891; *Vere v. Glynn*, 2 Dickens' Ch. 441.

In the case last mentioned it was held, that if defendant desired to plead to the amended bill, he must plead *de novo*.

Defendants in error, Patton and wife, by not pleading to the amended bill, waived their plea to the original bill, and the proceedings were then on the amended bill, and the demurrer thereto. *Lucas v. Holder*, 1 Eq. Abr. 41.

An amended bill takes the place of the original bill, and when it is filed the original bill ceases to perform any further functions as a pleading. *Bradish v. Grant*, 119 Ill. 611; *Barber v. Reynolds*, 33 Cal. 497.

When an original bill is taken as confessed, and an amended bill is subsequently filed, the order *pro confesso* is thereby opened. *Bank v. Finch*, 1 Barb. Ch. 75; 5 N. Y. Ch. 305.

So in this case, when the court permitted the amended bill to be filed, and a general demurrer thereto, the order of the court sustaining the plea to the original bill was annulled, and if defendants in error insisted on their plea, they should have pleaded *de novo* to the amended bill.

Brief for the Defendants in Error.

Amendments of the bill will be permitted after a demurrer or a plea has been filed, but generally not after it has been set down for argument. If amendment is permitted, and the date of the record of the amended bill is subsequent to that of the plea, the effect will be to strike the plea off the record. *Jennings v. Pearce*, 1 Ves. Jr. 448.

No matter how trifling the amendment to the bill, the defendant must either further plead, answer or demur, or the plaintiff is entitled to default on the whole bill. 1 Barb. Ch. Pr. 195; 1 Daniell's Ch. Pr. 403; 1 Smith's Ch. Pr. *305, note b; *Bassett v. Company*, 43 N. H. 251; *Mezeix v. McGraw*, 44 Miss. 112; *Tedder v. Stiles*, 16 Ga. 1; *Insurance Co. v. Jenkins*, 8 Paige, 589; *Cowman v. Lovett*, 10 id. 559; *Richardson v. Richardson*, 5 id. 58; *Bosanquet v. Marsham*, 4 Sim. 573.

MESSRS. PATTON & HAMILTON, for the defendants in error:

The only question involved is, whether the act of the circuit court in overruling the motion of plaintiff in error for leave to file the amendments proposed, was such an abuse of judicial discretion as to amount to error.

Amendments are in the discretion of the court. (*Barm v. Bragg*, 70 Ill. 283; 1 Barb. Ch. Pr. 207, 211.) And unless this court can say there has been an abuse of discretion, it will not interfere. *Schmidt v. Braley*, 112 Ill. 48; *Gordon v. Reynolds*, 114 id. 118; *Johnson v. Johnson*, id. 611.

Did the court abuse its discretion? In the first place, an amendment to a bill will not be allowed unless it will help the case of complainant. *Barm v. Bragg*, *supra*.

Cheney's right to redeem from a mortgage is fixed by section 10, chapter 77, of the Revised Statutes, which provides that "any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under the defendant, may, within twelve months from said sale, redeem the real estate thus sold." He was the mortgagor, and should

Brief for the Defendants in Error.

have redeemed within the twelve months. (*Dunn v. Rodgers*, 43 Ill. 260; *Seligman v. Laubheimer*, 58 id. 124.) Failing to do so, Patton, as judgment creditor, had the right to redeem, and thereby obtain priority. *Lamb v. Richards*, 43 Ill. 312; *Lloyd v. Karnes*, 45 id. 62; *Karnes v. Lloyd*, 52 id. 113; *McRoberts v. Conover*, 71 id. 524; *Moore v. Hopkins*, 93 id. 505.

A plea is a special answer, showing or relying upon one or more things as a cause why the suit should be either dismissed, delayed or barred. The defense proper for a plea is such as reduces the cause, or some part of it, to a single point, and from thence creates a bar to the suit, or to a part of it to which the bill applies. 1 Barb. Ch. Pr. 114; Mitf. Ch. Pl. 345.

If, upon argument, a plea is allowed, it is thereby determined to be a full bar to so much of the bill as it covers, if the matter pleaded, with the necessary averments to support it, be true. (1 Barb. Ch. Pr. 121.) And if the complainant fails to file a replication, not only the validity of the plea as a bar is admitted, but the truth of the facts set up, and of course the suit is at an end. 1 Barb. Ch. Pr. 121; *Knowlton v. Hanbury*, 117 Ill. 471.

If the complainant amends his bill he thereby admits the validity of the plea, as if the same had been allowed on argument. 1 Barb. Ch. Pr. 120.

Upon the allowance of a plea, leave to amend will not be given to enable the complainant to state facts as to the part covered by the plea tending to disprove it. The complainant must take issue upon it. Nor after allowance will he be permitted to amend by stating facts which, admitting the truth of the plea, seek to avoid or restrict its effect. 1 Barb. Ch. Pr. 121.

A significant feature of this case is, that the bill and proposed amendments are silent on the subject of Cheney's present interest in the notes and mortgage. If he went through the form of selling and indorsing them to Smith, and received Smith's money for them, how and when did he get them again?

Brief for the Defendants in Error.

Did he repurchase them? The legal title, as he says, passed to Smith by indorsement. They were no longer his, according to his theory in that case. Unless Smith held them for his use and benefit, something was necessary to re-invest him with the title to them. He could get title only through Smith, and thus he became a privy to Smith's title, and as such he is bound by the final decree dismissing the bill in the *Smith case*. *Umlauf v. Umlauf*, 117 Ill. 580; *Jenkins v. Bank*, 111 id. 462; *Dyer v. Hopkins*, id. 168; *Tilley v. Bridges*, 105 id. 336; *Cooper v. Corbin*, id. 224; *Chicago v. Cameron*, 120 id. 451; *Attorney General v. Railroad Co.* 112 id. 536.

The principle extends to the grounds of recovery or defense which, under the issue, might have been, but were not, presented. (*Bennitt v. Mining Co.* 119 Ill. 9; *Harmon v. Auditor*, 123 id. 127.) It is binding on one not a party, where the suit is carried on in the name of another, for his benefit.

In *Bennitt v. Mining Co. supra*, this court said: "Persons in whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person, fall within the category, and in such cases parol evidence is admissible to show who are the real parties in interest, and that they conducted the litigation in the names of other persons. (Freeman on Judgments, sec. 174, and authorities cited in notes.) In the case of *Cole v. Favorite*, 69 Ill. 457, the Supreme Court of this State recognized and approved this extension of the principle of *res judicata*, and then said: 'The suit in the Federal Court, although in the name of appellees, was prosecuted at the request of and for the benefit of appellant. He advised and directed it, was a witness therein, and while he was not formally a party to the record, he was a party in interest, and must be regarded a privy.'"

A decree dismissing a bill may be pleaded as a bar to another suit embracing the same subject matter. *Jenkins v. Bank*, 111 Ill. 462; *Knowlton v. Hanbury*, 117 id. 471.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court:

Plaintiff in error at one time had a valid lien upon the one hundred and sixty acres of land in Macoupin county, to secure the moneys which he had loaned to Rauch, and his mortgages were subordinate to the prior mortgage of Heaton, and to that alone. By the mortgage deeds Rauch had conveyed and mortgaged to him the equity of redemption. Unless the plea of *res judicata* should prevail, or some valid bar to his right otherwise be shown, it is manifest that if he was not a party to the Heaton foreclosure suit, then his equity of redemption still subsists, and he is entitled to relief in the chancery court.

Plaintiff in error was named as a defendant in the Heaton bill of complaint, but he claimed, either in his pleadings which were filed, or in the amendments thereto which the court denied permission to file, or in both, (and it is unnecessary for the purposes of this decision to critically examine the somewhat voluminous pleadings actually filed and offered to be filed, for the purpose of ascertaining just when and where such claims were made,) that he never entered or authorized any entry of his appearance in said foreclosure suit; that his supposed answer in said suit was filed by an attorney of the court without any right or authority, and that said attorney was not employed or requested to act for him, or in any manner to look after his rights or interests, and that he had no knowledge or information an answer had been filed in his behalf until after the sale by virtue of which the defendant in error James W. Patton claims to have obtained title, and that he was never served with process in said suit; that the supposed return endorsed on the summons therein, issued to Jersey county, purporting to have been made by the deputy sheriff, was a forgery, and that he had no knowledge or information of such supposed return of service until after the aforesaid sale to Patton. If these allegations are true, and if plaintiff in error is not barred by the adjudication in the Smith suit,

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then, it would seem, he has a good case, calling for the interposition of a court of equity.

It was also claimed in the original and amended bills, that defendant in error Patton was the attorney for Rauch in the suit wherein was recovered the judgment for \$1425.05 against said Rauch and his co-partners; that Rauch was insolvent, and that such fact was known to Patton, and that by fraudulent collusion and conspiracy between said Patton and Rauch, said judgment was, through Mathew Patton, Jr., brother of said Patton and brother-in-law of said Rauch, purchased at twenty-five cents on the dollar, and said judgment assigned to said James W. Patton, and that the object of such conspiracy and the assignment of the judgment, and the subsequent proceedings and sale thereunder, were for the purpose of aiding Rauch and defrauding plaintiff in error in respect to the collection and enforcement of his mortgages. If these allegations of plaintiff in error are true as matters of fact, then it would seem that a court of equity should not permit an attorney to thus, by fraudulent collusion, purchase the land of his client, to the injury of the creditor of such client, but that the court of conscience would, under such circumstances, hold the attorney to be a trustee for such creditor. It is to be remarked, however, both in regard to the above mentioned matters and in regard to other matters pleaded by plaintiff in error in avoidance of the claim of Patton that his title to the lands is absolute, that they are matters of which Henry J. Smith could have availed himself in the former suit brought to foreclose the mortgages, upon which the bill in the present case is predicated. See *Patton v. Smith*, 113 Ill. 499.

This brings us to a consideration of the plea interposed by Patton and wife to so much of the bill as seeks to foreclose the mortgages in respect to the lands in Macoupin county.

The rule applicable to pleas in equity is, that the same strictness and exactness are required in them that are required in pleas at law,—if not in matters of form, at least in matters

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of substance. (Story's Eq. Pl. sec. 658.) One requisite of such plea is, that it should clearly and distinctly aver all the facts necessary to render it a complete equitable defense to the case made by the bill, so far as the plea extends. (Ibid. sec. 665.) Where its allegations, being taken as true, do not, so far as it purports to go, make out a full and complete defense, or where the necessary facts are to be gathered by inference, alone, it will not be sustained. (Ibid. sec. 652; 2 Daniell's Ch. Pr. 103; Puterbaugh's Pl. and Pr. Ch. 137.) It must be specific and distinct, and must be perfect in itself, so that, if true, it will make an end of the case, or of that part of the case to which it applies. *Allen v. Randolph*, 4 Johns. Ch. 693.

If the adjudication in the suit brought by Smith to foreclose the mortgages was, in respect to plaintiff in error, simply *res inter alios acta*, and if he is not in privity with Smith, then it is manifest that he is not bound by the result of that litigation. It is admitted by the plea that plaintiff in error was not a party to the Smith suit to foreclose, and the extent of the allegations of the plea to show any connection between him and that suit are the averments, "that on the 24th day of May, A. D. 1880, one Henry J. Smith, as assignee and holder of the notes and mortgages in complainant's bill mentioned, from the complainant, exhibited his bill of complaint in the circuit court in the county of Macoupin, State of Illinois, against the defendants herein, for the foreclosure of said mortgages in satisfaction of said promissory notes, thereby stating that each and all of said notes, with the said mortgages, had been duly assigned and transferred to him, the said Henry J. Smith, by the said complainant, Prentiss D. Cheney, before the maturity of said notes, for a valuable consideration, and that the same were then held and owned by him, the said Smith." It is further averred in the plea, that "this defendant, James W. Patton, on the 4th day of October, A. D. 1880, put in his answer, denying that said notes and mortgages were in good

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faith, for a valuable consideration, assigned and transferred by the complainant herein to the said Henry J. Smith, as alleged in the said bill of complaint of said Smith."

We think that these allegations are insufficient to show that plaintiff either had any connection with or interest in that litigation, or to show any privity between him and Smith. It may well be that Smith sued *as* or in the capacity of assignee and holder of the notes and mortgages from Cheney, and Smith may have claimed that the notes and mortgages had been assigned and transferred to him by Cheney, and that they were held and owned by him; but, *non constat*, that Smith was in fact assignee and holder, or that Cheney had assigned and transferred the notes and mortgages to him, or that he held and owned them. To say one exhibited a bill as assignee is not equivalent to saying he was assignee, and any conclusion therefrom that he was assignee is a mere matter of inference. The answer that was filed in the suit by Patton put in issue the alleged fact of transfer and assignment, and as Smith failed in his suit, the presumption might well be that the attempted foreclosure failed simply because it appeared from the proofs that the notes and mortgages had not been assigned and transferred to him, and that he had no interest therein.

One of the assignments of error upon the record is, that the circuit court erred in sustaining the plea of defendants James W. Patton and wife to complainant's bill, and one of the contentions urged by plaintiff in error is, that his rights were not concluded by the decree in *Smith v. Patton*, and that therefore there was error in allowing the plea. We can not look out of the record, and since it does not appear from the plea that Cheney was a party to the suit of *Smith v. Patton*, or that that suit was prosecuted at his instance, or with his knowledge and consent, and in his interest or for his benefit, or that there is or ever has been privity in respect to the notes and mortgages between Cheney and Smith, we are forced to

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the conclusion that the plea was defective, and that, too, in regard to a matter of substance. All that is stated in the plea may be true, and yet the fact be, that Smith, in prosecuting his suit to foreclose, was acting in fraud of the rights of Cheney, and was a mere trespasser with reference to him and in respect to the notes and mortgages. If Smith was such wrongdoer, yet Cheney could not safely and without peril have taken issue on the plea by filing replication.

If, as matter of fact, the Smith suit was prosecuted at the instance of plaintiff in error, and for his benefit, then the adjudication in that case is binding and conclusive upon him. (*Cole v. Favorite*, 69 Ill. 457; *Bennitt v. Wilmington Star Mining Co.* 119 id. 9.) So, also, if Smith, at the time of his suit, was owner of the notes and mortgages, and plaintiff in error has since been re-invested with title, then he must necessarily have derived such title through Smith, and be in privity with Smith's title, and bound by the final decree rendered in the *Smith case*. In either of the events above supposed, the conclusiveness of the adjudication in the *Smith case* will include, not only what was determined in that suit, but also all other matters properly involved, and which might have been raised and determined in it. See *Bennitt v. Wilmington Star Mining Co. supra*, and authorities there cited.

What we have already said obviates the necessity of any further discussion of the errors assigned.

For the error committed in holding the plea to be sufficient, and allowing it, the decree is reversed. The cause is remanded, with directions to give plaintiff in error leave, if he shall be so advised, to further amend his bill, and to give like leave to defendants in error to amend their plea.

Decree reversed.

MAGRUDER and CRAIG, JJ., dissenting.

FRANK W. WACASER

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield November 1, 1890.

1. **CRIMINAL LAW**—*to justify or excuse a homicide—degree of proof required—of an instruction on that subject.* An instruction in a criminal case which requires the accused to justify or excuse a homicide, or establish his defense to the satisfaction of the jury, is error, as calling for a degree of proof not required by the law.

2. On the trial of one upon a charge of murder, the court, of its own motion, instructed the jury, that "if a man kills another, and the killing being proven or admitted, and then sets up self-defense as a defense to the indictment, the jury ought always to be *satisfied*, from the evidence, that the killing was done under an honest belief on the part of the defendant that it was necessary to save himself from death or great bodily harm," etc.: *Held*, that the instruction was erroneous, as calling for a higher degree of proof than was required of the defendant.

3. **SAME**—*reasonable doubt—propriety of giving an instruction.* On a criminal prosecution the defendant asked, and the court refused, this instruction: "A reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause." There was no other instruction given which embodied the full meaning of a reasonable doubt, as conveyed by the refused instruction: *Held*, that the court erred in refusing the instruction.

4. **INSTRUCTIONS**—*given by court of its own motion—requisites.* Where the trial court throws aside all the instructions asked by one or both parties, and prepares written instructions of its own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done to the defeated party by the refusal of the instructions asked by him.

WRIT OF ERROR to the Circuit Court of Champaign county; the Hon. C. B. SMITH, Judge, presiding.

Mr. JOHN R. EDEN, Mr. F. M. WRIGHT, and Mr. M. W. MATTHEWS, for the plaintiff in error:

It was error to instruct the jury that they "ought to be satisfied, from the evidence, that the killing was done under an

134	438
135	12
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137	168
134	438
171	477

Brief for the People. Opinion of the Court.

honest and sincere belief," etc. This was to require the defendant to establish his defense by a degree of proof not required in civil cases. *Hopps v. People*, 31 Ill. 385; *Hoge v. People*, 117 id. 35; *Alexander v. People*, 96 id. 96; *Herrick v. Gary*, 83 id. 89.

It was error to refuse defendant's ninth instruction asked, defining reasonable doubt. *Miller v. People*, 39 Ill. 459; *Dunn v. People*, 109 id. 639; *May v. People*, 60 id. 119.

Mr. GEORGE HUNT, Attorney General, Mr. JOHN E. JENNINGS, State's Attorney, and Mr. HORACE S. CLARK, for the People:

The principles of the refused instructions, so far as legal and proper, were embodied in those given by the court.

As to reasonable doubt, see *Mullins v. People*, 110 Ill. 42; *Davis v. People*, 114 id. 86; *Leigh v. People*, 113 id. 372; *Bressler v. People*, 117 id. 437; *Crews v. People*, 120 id. 317.

Mr. JUSTICE MAGRUDER delivered the opinion of the Court:

At the November Term, 1888, of the Circuit Court of Moultrie County, the plaintiff in error, Frank W. Wacaser and one Owen M. Babb were indicted for the murder of John B. Cline in said county on May 17, 1888. A trial was had at the April term, 1889, of said court, which resulted in a verdict of not guilty as to Babb and a disagreement of the jury as to the plaintiff in error. Afterwards in June, 1889, the cause was removed by change of venue to the Circuit Court of Champaign County, where a second trial was had in November, 1889, and, by the verdict of the jury, the defendant was found guilty of manslaughter, and his punishment fixed at twenty-five years in the penitentiary. Judgment was rendered upon the verdict after the overruling of motions for new trial and in arrest of judgment.

In the neighborhood where the farms of these parties were located the public road runs north and south; Wacaser lived on the east side of the road; north of him and on the west

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side of the road lived Bryan, a brother-in-law of Cline, while still further to the north lived Cline, the deceased. North of his house, and in the north east corner of his farm, Bryan had a pasture, containing ten acres, enclosed by a board fence on the north and by a board and wire fence on the west. Wacaser had rented, and planted in corn, some land belonging to his father and lying north of Bryan, and he also owned some land to the west of Bryan. The land of Bryan lying west of his pasture had been recently ploughed.

Westward from the public road, and along the fence on the north side of Bryan's pasture, runs a "turning row" which is wholly upon the land belonging to Wacaser, or rented by him from his father. Prior to the homicide there had been some dispute between Bryan or Cline and Wacaser as to the boundary line between the Wacaser land and the Bryan land; plaintiff in error had expressed his unwillingness that Cline should go upon his land; he seems to have claimed that Bryan's north fence was upon his land, and there is something in the evidence to the effect that he had once had Bryan indicted.

Early on the morning of May 17, 1888, plaintiff in error sent three men to work in his field lying west of Bryan's pasture. Shortly afterwards he himself started in a wagon with his hired man named Babb, and a boy about fifteen years old, named Cunningham, to go to the same field for the purpose of planting potatoes. He travelled northward on the public road until he reached the north east corner of Bryan's pasture, then turned from the public road into the turning row and drove westward along the turning row, until he had reached a point about seventy five or one hundred yards west of the northwest corner of Bryan's enclosure. Here he looked back and saw the deceased driving a team, behind which he was walking, from the public road into the turning row. He hallooed to Cline and motioned to him to go southward on the public road, but Cline turned into the turning row and drove westward. Plaintiff in error then gave the reins to Cunning-

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ham, jumped out of the wagon remarking, "there comes a man I don't want to cross my land," and went eastward towards the deceased. The latter in the meantime turned his team southward upon Bryan's land and along the west fence of Bryan's pasture, and, throwing the lines over the second or third post of the fence, returned to meet Wacaser. A fracas then occurred between the two men near the northwest corner of the pasture in the turning row, or a few feet south of it, and near the west fence of the enclosure.

During the fracas the plaintiff in error stabbed Cline with a knife or dirk. The deceased went through the fence into the pasture, and, while going southeast towards Bryan's house, fell upon the ground and died before reaching the house.

We forbear entering into a detailed discussion of the evidence, as the case must be reversed and sent back for another trial for the reasons hereinafter stated. It was sought, upon the trial below, to justify the homicide upon the ground of self-defense. It is claimed upon the part of the defendant, that the fatal blow was given under circumstances sufficient to create in his mind a well-grounded belief that he was in danger of losing his life, or suffering great bodily harm. It was for the jury to say whether or not the theory of self-defense was established, but it was important, under the circumstances of the case as disclosed by the record, that they should be accurately instructed.

The defendant asked the trial court to give twenty instructions, all of which were refused. The trial judge then of his own motion gave and read to the jury an instruction written and prepared by himself. No instructions seem to have been asked by the prosecution, but whether such was the fact or not, no other instruction than that prepared by the court was given. The instruction so given is very long, consisting of thirty six paragraphs.

In *Hill et al. v. Parsons et al.* 110 Ill. 107, all the instructions requested by both sides, seven on behalf of the plaintiffs

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and eight on behalf of the defendants, were refused, and three instructions carefully prepared by the court were read to the jury. In that case it was said: "Whether any of defendants' instructions contained correct propositions of law or not, is not a material inquiry here, as the instructions given by the court fairly instructed the jury on all legal questions involved in the case. No injury was done by the refusal of the instructions prepared by them." It may be laid down as a sound rule that, where the trial court throws aside all the instructions asked by one or both of the parties, and prepares written instructions of its own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done to the defeated party by the refusal of the instructions asked by him. As to more than a dozen of the instructions which the defendant in this case requested the court to give, it is not claimed that they were erroneous, but it is insisted that their substance was embodied in the instruction prepared by the court. This is, for the most part, true. But we think that the twenty sixth paragraph of the given instruction was calculated to mislead the jury. Its first clause is as follows: "If a man kills another and the killing be proven, or admitted, and then sets up self-defense as a defense to the indictment, the jury ought always (to) be *satisfied* from the evidence, that the killing was done under an honest belief on the part of the defendant, that it was necessary to save himself from death, or great bodily harm," etc.

Instructions, which require the proof to be such as to produce "*satisfaction*" in the minds of the jury, have been several times condemned by this court. In *Herrick v. Gary*, 83 Ill. 85, which was a civil case, the instruction was: "the plaintiff must show, by the evidence in the case, *to the satisfaction* of the jury," etc. We there said of this language: "it places the standard of the degree of proof required higher than the law demands in controversies of this character. It is enough that the jury shall believe, from the evidence, that the essen-

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tial facts are true. The jury may so believe, although the same may not be shown by the evidence to the satisfaction of the jury. This instruction requires not merely that the evidence shall produce belief in the mind of the jury of the facts alleged, but that such belief shall be so strong as to be satisfactory. This is perhaps not quite so strong as to require a belief beyond a reasonable doubt, but it approximates it, and which is only required in criminal cases. The mind cannot well be said to be satisfied as to a given proposition, so long as such matter remains at all in doubt. For this reason, the instruction must be condemned."

Later, in *Graves et al. v. Colwell*, 90 Ill. 612, also a civil suit, an instruction, which required a fact to be proved "to the satisfaction of the jury," was interpreted as requiring the preponderance of proof to be so greatly in favor of such fact as to satisfy their minds, "a thing which could only be accomplished by producing a state of moral certainty, or, in other words, by proving beyond a reasonable doubt" such fact.

Later still, in *Alexander v. The People*, 96 Ill. 96, the principle announced by the civil cases was applied to a criminal case. In the *Alexander* case, the accused sought to show that he was justified or excused in committing the homicide, and the condemned instruction told the jury, that it was "incumbent upon the defendant satisfactorily to establish such defence." We there said: "This is stating the rule of evidence broader than the law will warrant. The statute provides that he is only bound to prove the circumstances that justify or excuse the homicide as any other fact is to be proved, and as this instruction cast upon the accused what may have well been understood to be a higher degree of proof, it is plainly erroneous and may have prejudiced the defence."

In view of the interpretation thus given by this Court to the language used in the above quoted clause of the given instruction, the clause in question must be regarded as erroneous.

Syllabus.

Again, the ninth instruction asked by the defendant should have been given. It is as follows: "A reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause." This definition of "reasonable doubt" may not be quite so full and accurate, as the definition already approved of by this Court in a number of cases, (*Spies et al. v. The People*, 122 Ill. 1,) but it is substantially the same as that laid down in *Dunn v. The People*, 109 Ill. 635. The defendant was entitled to have the jury instructed as to what a reasonable doubt was, if he submitted an instruction correctly defining that term. We find no definition of reasonable doubt in the instruction given by the court, which embodies the full meaning conveyed by the refused instruction.

For the reasons here indicated the judgment of the Circuit Court is reversed, and the cause is remanded to that court.

Judgment reversed.

184	444
204	1244

184	444
214	1179

WILLIAM W. LANGFORD

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Springfield November 1, 1890.

1. CRIMINAL LAW—*possession of stolen goods—as evidence of guilt—as to both burglary and larceny.* Where a larceny of goods is committed at the time of a burglary, the possession by a party, immediately after the crime, of some of the stolen goods, is evidence of guilt, and participation in the burglary as well as in respect of the larceny.

2. SAME—*general verdict—several counts.* Where a burglary is committed by breaking into a railroad car, the prosecution may allege the ownership of the car in different corporations, by two or more separate counts; and a general verdict of guilty may be referred to either count, when only one felony is shown, and such verdict will authorize judgment.

Brief for the Plaintiff in Error.

3. CHANGE OF VENUE—*regularity of proceedings—objection waived after verdict.* An objection to the sufficiency of the clerk's certificate to the transcript of the proceedings on a change of venue is waived by the party going into the trial. All objections to the regularity of the proceedings in obtaining a change of venue, and the jurisdiction of the court to which the case is sent, are waived by the verdict.

WRIT OF ERROR to the Circuit Court of Fulton county; the Hon. JOHN C. BAGBY, Judge, presiding.

MR. H. W. MASTERS, MR. H. R. NORTRUP, and MR. I. R. BROWN, for the plaintiff in error:

A verdict which does not find on all the issues is defective. 2 Thompson on Trials, sec. 2639; *Ruth v. People*, 99 Ill. 185; *Williams v. People*, 44 id. 478; *Rex v. Woodfall*, 5 Burr. 2661.

Where the charge is burglary, the mere possession of stolen goods, unaccompanied with other suspicious circumstances, is not enough to afford *prima facie* evidence of the burglary. 1 Wharton on Crim. Law, 729; *State v. Reed*, 20 Iowa, 413.

The possession of stolen goods, without other evidence of guilt, is not regarded as *prima facie* evidence of burglary. *State v. Hayden*, 45 Iowa, 11; *Commonwealth v. Thompson*, 99 Man. 444; *People v. Gordon*, 40 Mich. 716; *Davis v. People*, 1 Parker's Ch. 447.

When several distinct causes of action are joined in the petition, in different counts, as they must be, a general verdict in favor of the plaintiff is void, since it can not be known to which of the counts it applies. (*Bricker v. Railroad Co.* 83 Mo. 391.) And where, in an indictment, distinct offenses are charged in separate counts, the jury must either return a general verdict of not guilty, or a verdict which responds to each separate charge. *Carey v. State*, 20 Neb. 138; *Wilson v. State*, 20 Ohio, 26; *Williams v. State*, 6 Neb. 334.

In this State, a verdict of guilty returned as to one of several counts is responsive to all, and means not guilty as to all the other counts.

Brief for the People.

We do not intend to say that the court may not sometimes apply the verdict; but a limitation of the rule is, that the amendment must, in all cases, be such as to make the verdict conform to the real intention of the jury. The judge can not invade the province of the jury. *Acton v. Dooley*, 16 Mo. App. 441.

Mr. GEORGE HUNT, Attorney General, Mr. KINSEY THOMAS, and Mr. T. H. MEHAN, State's Attorney, for the People :

The possession of property recently taken by a burglary is *prima facie* evidence of a participation in the burglary. *Smith v. People*, 115 Ill. 17; *Sahlinger v. People*, 102 id. 241; *Comfort v. People*, 54 id. 404.

Error in an instruction will not always reverse. *Rice v. Brown*, 77 Ill. 549; *Panton v. People*, 114 id. 505.

A prosecutor may be required to elect on which of several counts he will proceed, but after verdict it is too late to raise that objection. 1 Bishop on Crim. Proc. secs. 449, 473; *Thompson v. People*, 125 Ill. 256.

In this case, all of the counts are of similar import, and the punishment the same under one and all. Therefore, there was no necessity for anything more than a general finding of guilty, and fixing the term of imprisonment. *Armstrong v. People*, 37 Ill. 459; *Bond v. People*, 39 id. 26; *Lyons v. People*, 68 id. 271; *Duffin v. People*, 107 id. 113.

In criminal cases, a general verdict of guilty is sufficient, without specifying in the verdict, by reference to the indictment or otherwise, the offense of which the defendant is convicted. *Lyons v. People*, 68 Ill. 271; *Eyman v. People*, 1 Gilm. 4; *Davis v. People*, 50 Ill. 199.

A general verdict of guilty will be referred to the good counts. *Hiner v. People*, 34 Ill. 297.

If the evidence at the trial did not tend to support a particular count, or such count is bad, yet the jury have returned a general verdict of guilty on the whole, the court, not always

Opinion of the Court.

through the formality of an amendment, but sometimes simply at the sentence, applies the verdict to,—in other words, treats it as rendered on,—the other and good counts, to which the judgment, alone, by its terms, is made to attach. See 1 Bishop on Crim. Proc. sec. 1014; *State v. Smith*, 5 Am. Dec. 132; *Curtis v. People*, Breese, 256; *Holliday v. People*, 4 Gilm. 111.

As to the last objection made by the plaintiff in error,—that the judgment should have been arrested “because the certificate of the clerk, or, rather, the transcript from the circuit court of Mason county, was defective, and did not confer jurisdiction of the cause upon the court who tried the case,”—we have only this answer to make: Our statute provides that “all questions concerning the regularity of proceedings in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute judgment, shall be considered as waived after trial and verdict.” Rev. Stat. chap. 146, sec. 35.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an indictment against William W. Langford, for burglary and larceny. The first count charged the burglary to have been committed by breaking into a car of the Chicago, Peoria and St. Louis Railroad Company. The second count charged the breaking into a car of the Jacksonville and Southeastern Railroad Company. Upon a trial of the cause the jury found the defendant guilty of burglary, in manner and form as charged in the indictment, and fixed his punishment in the penitentiary at a term of one year. The court directed the verdict to be applied to the first count of the indictment, and rendered judgment on the verdict.

The first ground of reversal relied upon is, that the evidence was not sufficient to establish the guilt of the defendant. The charge against the defendant was, that he broke into a car standing on the side-track of a certain railroad at Havana,

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broke open a crate containing sixteen pieces of bacon, and stole eight of the sixteen pieces. It appears from the evidence, that the car arrived at Havana in the afternoon of June 17, and was placed on a side-track, about three hundred feet from the residence of the defendant. When the car arrived the crate contained sixteen pieces of bacon, which was nailed up in the crate in good order. On the next morning it was found that the car had been broken open and eight pieces of the meat taken away. Search was immediately made, and eight pieces of bacon found in the defendant's cellar. The crate, before it was broken open, weighed 275 pounds. After the eight pieces were taken the crate weighed 173 pounds, and the meat found in defendant's cellar weighed 100 pounds. The meat found in the cellar was in the same condition as it was when stolen from the crate, except a few pounds had been cut off the end of one of the pieces. In addition to finding the meat in the possession of the defendant, grease was found on the sides of the cellar door, where it had been taken down the cellar, and the legs of a pair of pants, recognized as belonging to the defendant, were found to be saturated with grease. The evidence identifying the meat found in the possession of the defendant as the same meat stolen from the car was slight. But that was purely a question of fact for the jury, and we are not prepared to say it was insufficient to authorize the verdict. The defendant did not attempt to show that he owned the meat found in his possession, or that it came into his possession honestly, as he doubtless could have done if such had been the fact. Under such circumstances, although the evidence identifying the meat found in defendant's possession as the same meat taken from the crate may be slight, we are not inclined to disturb the finding of the jury.

On behalf of the People the court instructed the jury, in substance, that possession of stolen property immediately after the theft is evidence which will warrant a conviction, unless

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overcome by circumstances or other evidence, and it is insisted that the rule that governs in cases of larceny does not apply in burglary. The same question was raised in *Smith v. People*, 115 Ill. 17, and it was there held, that where a larceny of goods is committed at the time of a burglary, the possession of a party, immediately after the crime, of some of the stolen goods, is evidence of guilt, and participation in the burglary as well as in respect to the larceny. Here, when the car was broken open the meat was stolen. There was therefore a larceny at the time of the burglary, and the case cited is conclusive on the question.

It is also claimed that the verdict of the jury was defective, because it fails to designate under which count of the indictment it was found. As before observed, the first count of the indictment charged the defendant with breaking and entering a certain car, the property of the Chicago, Peoria and St. Louis Railroad Company. The second charged the burglary of a car, the property of the Jacksonville and Southeastern Railroad Company, and it is alleged in each that the respective railroad companies are organized under the laws of this State. Upon looking into the evidence, it appears that the testimony introduced to establish the defendant's guilt was confined to a single transaction,—that is, the breaking into one car and stealing therefrom a certain quantity of meat. While the indictment contained two counts there was but one felony, and under the rule laid down in *Lyons v. People*, 68 Ill. 273, we perceive no valid objection to the verdict. In the case cited, the indictment contained two counts,—one for burglary, and the other for petit larceny,—and there, as here, the jury returned a general verdict of guilty. It is there said: "It necessarily follows, that where an indictment, as in this case, in one count charges the breaking and entering of a car with intent to steal, and in another count a stealing, at the same time, in the car which was so broken and entered, and the defendant

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is found guilty generally, and a punishment imposed which is by law authorized to be inflicted for the offense charged in either count, the verdict must be sustained." See, also, *Bond v. People*, 39 Ill. 26; *Armstrong v. People*, 37 id. 461.

While it would not be proper to include separate and distinct felonies in different counts of the same indictment, it is always proper for the State's attorney to allege the same offense in different forms, and in as many different counts as he may think proper, where all the counts may be for felonies or all for misdemeanors. Here there was but one car entered and but one larceny committed, and the pleader had the right, if he saw proper, to allege the car and the meat therein belonged to one corporation, in one count, and to another corporation in another count, and a general verdict of guilty might be referred to either count of the indictment.

It is also claimed that the clerk's certificate to the transcript of the proceedings in Mason county before the venue was changed, is insufficient to confer jurisdiction on the circuit court of Fulton county, and upon that ground the judgment should have been arrested. This question is fully met by section 35, chapter 146, of the statute, which provides, "that all questions concerning the regularity of proceedings in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute judgment, shall be considered as waived after trial and verdict."

The judgment will be affirmed.

Judgment affirmed.

Mr. JUSTICE SHOPE, dissenting.

Syllabus.

THE CITY OF BLOOMINGTON

v.

THE CHICAGO AND ALTON RAILROAD COMPANY.

Filed at Springfield November 1, 1890.

1. SPECIAL TAXATION—upon contiguous property—in what cases allowable—conditions to the exercise of the power. A city council has, by law, the power to widen, extend and further open the crossing of a public street under a railway track, but has no power, by special taxation or otherwise, to provide for the building of a railroad bridge over a street crossing as a local improvement.

2. Where the ordinance fails to show any proper case for special taxation of contiguous property, or such ordinance is grossly unreasonable, unjust and oppressive, that may be shown in defense of an application to confirm the levy of special taxes.

3. An ordinance which requires the widening of a street crossing a railroad under its track, and for the construction of a railroad bridge over the enlarged crossing, to be paid for principally by the railway company's contiguous property specially taxed for that purpose, without any compensation to the company for the burden attempted to be imposed on it, is not only unreasonable, but clearly in excess of the powers conferred on the city council, and void.

4. An ordinance which shows on its face an attempt to subject property to special taxation to pay for an improvement, which property will in no way be benefited by such improvement, will not justify proceedings for the levy of such taxes. Special taxes for local improvements are justified only on the ground that the subject of the tax receives an equivalent.

5. Where it is apparent that a local improvement can not benefit contiguous or adjacent property, the levy of special taxes on such property for the purpose of making such improvement can not be sustained.

6. The corporate authorities of cities and villages may not arbitrarily provide, by ordinance, that an improvement within their corporate limits shall be treated as a local improvement, to be paid for by special taxation of abutting property, without reference to benefits, without having their action reviewed by the courts.

7. SPECIAL ASSESSMENTS—objections to confirmation—not all of them well taken. There is no error in refusing a motion to strike out all of the objections to the confirmation of a special assessment, for irrelevancy, unless none of them present a defense.

134	451
142	479
143	104
144	878
145	289
134	451
149	314
150	86
153	652
154	166
154	176
155	269
134	451
161	293
134	451
158	659
134	451
170	440
171	89

134	451
189	*264
f189	*267

Brief for the Appellant.

APPEAL from the County Court of McLean county; the Hon. C. D. MYERS, Judge, presiding.

Mr. A. E. DE MANGE, and Mr. LAIN WELTY, City Attorney, for the appellant:

If the objections had been demurred to, the demurrer would not have admitted the truth of the objection. *Enos v. Springfield*, 113 Ill. 65; *Fagan v. Chicago*, 84 id. 235; *Chicago v. Sherwood*, 104 id. 554.

What possible connection is there between the city's right to levy and have confirmed special taxes to pay for a local improvement, and the payment to objector of the amount of its condemnation judgment? It has been determined by this court that there is none. *Fagan v. Chicago*, 84 Ill. 236; *Hyde Park v. Borden*, 94 id. 36; *Holmes v. Hyde Park*, 121 id. 128.

The statute gives cities exclusive discretion and power to determine whether a proposed improvement shall be made, and whether it shall be done by special taxation, special assessment or general taxation. It is a political power and discretion, and the courts have no power to interfere with it. *Fagan v. Chicago*, 84 Ill. 231; *Ricketts v. Hyde Park*, 85 id. 112; *People ex rel. v. Hyde Park*, 117 id. 462; *Dunham v. Hyde Park*, 75 id. 374; *Sterling v. Galt*, 117 id. 17; *Springfield v. Green*, 120 id. 271.

Where the city extends a street across a railroad, and no compensation is paid, the city must restore the track, etc., to its former state. *Starr & Curtis' Stat.* 472.

The exact question which appellee attempted to raise in the court below has been passed upon by the courts of last resort in several different States, and always with the same result. *Gennet v. Brooklyn*, 99 N. Y. 296; *People ex rel. v. Mayor*, 4 id. 419; *Livingston v. Mayor*, 8 Wend. 85; *Railroad Co. v. Bennett*, 10 Hun, 91; *State v. Kansas City*, 89 Mo. 34.

A case which arose in Ohio, upon bill for injunction, was thoroughly discussed by the Supreme Court, and all the judges

Brief for the Appellee. Opinion of the Court.

concurrent in reversing a decree for an injunction. *Cleveland v. Wick*, 18 Ohio St. 303.

The question as to whether the imposition of this tax imposes a peculiar hardship in this case ought to be left to a court of equity, if the defendant seeks its aid, by bill to enjoin, and which could hear evidence outside. *Brush v. Carbondale*, 78 Ill. 74; *Holmes v. Hyde Park*, 121 id. 130.

Under the present constitution and statute of this State special taxes may be levied without regard to benefits, and without regard to whether the tax exceeds the value of the property upon which it is levied. *Springfield v. Green*, 120 Ill. 269; *Murphy v. People*, 120 id. 240; *Enos v. Springfield*, 113 id. 72.

Messrs. WILLIAMS & CAPEN, for the appellee:

The constitution provides that private property shall not be taken for public use without just compensation. Const. art. 2, sec. 13.

The land owner must be paid in money, alone, the full value of the land taken, irrespective of any benefits and advantages which may result to his remaining land. *Hayes v. Railroad Co.* 54 Ill. 373; *Todd v. Railroad Co.* 78 id. 530; *Railroad Co. v. Laurie*, 63 id. 264; *Hyslop v. Finch*, 99 id. 171; *Carpenter v. Jennings*, 77 id. 250; *Green v. Chicago*, 97 id. 370; *Harwood v. Bloomington*, 124 id. 48.

The present proceeding is contrary to the constitutions of the United States and the State of Illinois. *Scott v. Toledo*, 36 Fed. Rep. 369; *Stuart v. Palmer*, 74 N. Y. 183.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

On the 10th day of January, 1890, the city council of the city of Bloomington, in pursuance of the provisions of article 9, chapter 24, of the Revised Statutes, passed an ordinance entitled "An ordinance for the opening and widening of Olive street," as follows:

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"Sec. 1. That the crossing for Olive street under the Chicago and Alton railroad be widened and extended and further opened across and embracing the following described real estate, to-wit: Commencing at the intersection of the east line of the right of way of said Chicago and Alton railroad with the south line of Olive street; thence northeasterly along the east line of said right of way of said railroad to the north line of Olive street; thence west parallel with the north line of Olive street west of said railroad, to the west line of said right of way of said railroad; thence southeasterly along the west line of said right of way of said railroad, to the south line of Olive street; thence east to the place of beginning. And for that purpose all necessary excavating, grading, and all other necessary work to open said passage for said street, shall be done.

"Sec. 2. After said street has been so opened and widened and extended, as provided in section 1 of this ordinance, then there shall be erected over said passageway, and under the rails of the Chicago and Alton Railroad Company, an iron bridge. Said bridge shall have iron girders of sufficient capacity and dimensions to support all railroad tracks now laid and operated by said Chicago and Alton Railroad Company, and all such cars, locomotives and other rolling stock as may in course of time be run over the same. Said bridge shall have a clear span of forty feet. Said girders shall be supported at each end by stone abutments, constructed of a good quality of Joliet limestone. There shall be a clear headway under said bridge of not less than twelve feet from the bottom of said girders, when laid, to the surface of said passageway below. A twelve-inch sewer inlet shall be placed in said passageway of said street, under the center of said bridge, and shall be connected by twelve-inch sewer pipe with the Orchard Lane sewer now under said street,—all according to plans and specifications on file in the office of the city clerk of said city.

"Sec. 3. That the entire cost of opening, widening and extending said street and of constructing said bridge, as provided

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in sections 1 and 2 of this ordinance, and the cost of assessing and collecting a special tax to pay therefor, shall be paid for by special taxation of the property and real estate abutting or fronting on said improvement, and for that purpose a special tax is hereby ordered to be levied upon the property and real estate fronting or abutting upon said improvement, equal to the entire cost of the same, together with the cost of assessing and collecting such special tax.

"Sec. 4. That when said improvement is completed, then the approaches thereto from Olive street as it now is, both east and west of said proposed improvement, shall be excavated, graded and filled so as to properly connect with said improvement; and the entire cost of such excavating, grading and filling said approaches shall be paid for by general taxation, and shall be included in the annual appropriation ordinance for the ensuing year, and levied and collected as a part of the general taxes of said city.

"Sec. 5. That Cheney Moulton, George McIntosh and William Stautz are hereby appointed to make an estimate of the cost of said entire improvement so provided to be paid for by special taxation, including the cost of assessing and collecting the special taxes to pay therefor, and also a separate estimate of the cost of grading and filling said approaches, and report the same to the city council of said city."

The committee appointed to estimate the cost of the improvement made the following report:

"Cost of excavating and grading for all that part	
of said improvement to be paid for by special	
taxation, - - - - -	\$911.00
Cost of stone masonry for said improvement, -	7,364.00
Cost of all other materials and labor, - - -	7,224.00
Court costs, including the cost of assessing and	
collecting the special taxes provided for in said	
ordinance, - - - - -	300.00
Total to be paid for by special taxation, - -	<u>\$15,799.00"</u>

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In due course, commissioners were appointed to assess the special tax provided for in the ordinance, who made the following assessment, viz :

<i>"Chicago and Alton Railroad Co.—</i> The right of way, franchise and right of occupancy of the Chicago and Alton Railroad Company, 100 feet in width, extending from the north line of Olive street, in a northeasterly direction, to the south line of Washington street, in the city of Bloomington, McLean county, Illinois, including the railroad located thereon,		\$7,899.50
<i>Chicago and Alton Railroad Co.—</i> The right of way, franchise and right of occupancy of the Chicago and Alton Railroad Company, 100 feet in width, extending from the south line of Olive street, in a southwesterly direction, to the city limits, being the north line of Sec. 8, in T. 23 N., R. 2, E. of 3d P. M., including the railroad located thereon, all in McLean county, Illinois,		7,899.50
Total amount,		\$15,799.00"

To this report appellee filed many objections, and appellant moved to strike them from the files, because they were irrelevant, and presented no legal defense to the confirmation of said report. The motion was overruled. Quite a number of the objections were irrelevant, but the motion was to strike out all of them, pointing out no specific objection to either. There was therefore no error in overruling the motion, unless it could be maintained that none of them presented a valid defense to the assessment, which is not insisted upon.

Upon overruling said motion, certain of the objections were sustained and the petition dismissed, to which order appellant duly excepted, and prayed this appeal.

Among the objections sustained were the following :

"10. Said ordinance, petition, and all proceedings thereunder, are grossly unreasonable, unjust and oppressive against the defendant, and therefore void."

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"18. Because said petition and ordinance do not show any state of case where it is lawful to assess any special tax against the said property."

These go to the entire merits of the case, and if it shall be found that they were properly sustained, it will be unnecessary to notice others. They go to the regularity of the proceeding as shown by the ordinance, and subsequent proceedings, and therefore whether or not evidence should have been heard as to other objections, is of no consequence.

A fatal objection to the ordinance lies in the fact that it attempts to provide for the building of a railroad bridge for appellee as a local improvement. While the statute does not define a local improvement, within the meaning of section 1, chapter 24, article 9, of the Revised Statutes, certainly no one will contend that by that section power is conferred upon the corporate authorities of cities and villages to make improvements other than of a public nature and for the benefit of the corporation. Here, the city council had the power to widen, extend and further open the crossing of Olive street under the railroad grade and track, but we are at a loss to find any authority, in the statute or elsewhere, empowering it to say what kind of a bridge shall be placed over that crossing for the use of the railroad. Section 3, and subsequent sections of said article 9, provide, that when a local improvement requires the taking or damaging of property, just compensation therefor shall be ascertained, and paid to the owner. If the improvement of Olive street took or damaged the property of the railroad company by requiring it to build a new crossing for its tracks, it would be entitled to just compensation therefor. It must, however, build its own railroad bridge, and be held responsible to the public for its sufficiency and safety. By what right can corporate authorities of cities and villages undertake to say what the structure of a railroad bridge shall be,—what will be sufficient "to support all tracks now laid and operated,

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and all such cars, locomotives and other rolling stock as may in course of time be run over the same?"

The improvement provided for in the second section of the ordinance, if built, would be solely for the benefit of the Chicago and Alton Railroad Company. It would in no way benefit the city of Bloomington. It would belong to the railroad company, and of necessity be under its exclusive control and management. The whole cost of the improvement to be paid for by special taxation, as shown by the estimate, is \$15,499, \$911 of which would be expended on the improvement of Olive street, and \$14,588 in erecting the railroad bridge. In this case the intention was to compel the railroad company to pay the entire cost; but that does not affect the question of power in the city council to build the bridge by special or any other kind of taxation. Moreover, if the railroad company is compelled to pay for the bridge, and as it must clearly be held responsible to the public for its safety, and is alone interested in the question of its capacity, why should it not be allowed to determine how and of what material it should be made, and why should it not be allowed to contract as best it may for building it?

For the reasons stated, the ordinance is not only unreasonable, but clearly in excess of the power conferred upon the city council.

We think it is subject to the further fatal objection, that it shows on its face an attempt to subject property to special taxation to pay for an improvement, which will in no way be benefited by such improvement. It is clear from the description of the improvement, and the requirement that it should be paid for by special taxation of abutting property, that the right of way, etc., of the appellee, north and south of "Olive street," would necessarily be compelled to bear the entire burden of the special tax to be levied,—and the assessment made so demonstrates. It also clearly appears that the contemplated change in the street would damage, rather than benefit,

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the railroad company. It would at least necessitate an expenditure of the cost of a railroad bridge, as shown by section 2 of the ordinance, (which the city council estimate at \$14,588,) to restore its grade and track. It is impossible to see how "the right of way, franchise and right of occupancy" of the railroad company abutting on the street could be benefited by the proposed change in the street crossing.

Special taxes for local improvements, like special assessments, "are justified on the ground that the subject of the tax receives an equivalent." (*Allen v. Drew*, 44 Vt. 175, cited in *White v. The People ex rel.* 94 Ill. 604.) "Taxation for local improvements is intended for the benefit of the property subjected to such tax, and although such benefits may not be exactly confined to contiguous property, yet for practical purposes it will generally be so nearly so, that to simplify the proceeding, and avoid the expense and delay of nicely adjusting the equities, the constitution has provided the property contiguous to the improvement may be required to bear this burthen, inasmuch as that, as a general rule, will do no serious injustice." *Craw et al. v. Village of Tolono et al.* 96 Ill. 261.

The only difference in special assessments and special taxation as to benefits is, that in the latter case the determination of the city council is final,—not an arbitrary, unreasonable determination, but one which can be seen to be fairly and reasonably made. In *White v. The People ex rel. supra*, (at page 613,) it is said: "The city council have determined the frontage to be the proper measure of probable benefits. *That is generally considered as a very reasonable measure of benefits in the case of such an improvement*; and if it does not, in fact, in the present case, represent the actual benefits, it is enough that the city council have deemed it the proper rule to apply." So it was said by Chief Justice DICKEY in *Craw et al. v. Village of Tolono et al. supra*, speaking of the rule laid down in *White's case*, and apprehensions of its abuse: "So long as it is confined to sidewalks there is little cause for such appre-

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hension. It will be time enough to consider the question when a case of apprehension occurs. Meanwhile it may not be amiss to suggest that all this must be done, if at all, by ordinance, *and it must be remembered that ordinances, to be valid, must be reasonable,—not unfair or oppressive,—and must spring from an honest exercise of legislative discretion.*"

It needs no argument to show that the effect of widening and extending the crossing of "Olive street," upon the property taxed by this ordinance, is entirely different from that on abutting property by the laying a sidewalk, or grading a street in front or along the side of it. In the one case, common observation teaches us that the improvement of the sidewalk or street benefits the property. Here, the ordinance shows, on its face, that the taxed property must be injured, and in no way benefited. The power of a city council to declare what shall be a local improvement is an implied power. An ordinance exercising that power, though regularly passed, must be reasonable, otherwise it is void. (1 Dillon on Mun. Corp. sec. 319; *Wiggins v. City of Chicago*, 68 Ill. 372; *Tugman v. City of Chicago*, 78 id. 405; *Craw v. Tolono*, *supra*.) To hold that the corporate authorities of cities and villages may, under section 1 of article 9, *supra*, arbitrarily provide, by ordinance, that any improvement within their corporate limits shall be treated as a local improvement, to be paid for by special taxation on abutting property, without reference to benefits, and that such action can not be reviewed, would be to clothe such authorities with unprecedented power, and, we have no doubt, violate the intention of the legislature in adopting that section.

It is said, it was the statutory duty of appellee to do that which this ordinance requires of it. That question is not before us; but if it be conceded, it by no means follows that this ordinance is valid.

In our opinion, the judgment of the county court was right, and it will be affirmed.

Judgment affirmed.

Syllabus.

THE HOME NATIONAL BANK OF CHICAGO

v.

ESTATE OF JAMES S. WATERMAN.

Filed at Ottawa October 31, 1890.

134	461
46a	167
134	461
73a	47

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106a	*217

1. *CONTRACT—original or collateral—contract of guaranty.* A written agreement on the part of certain stockholders of a private corporation, with a bank, which held the notes of the corporation to the amount of \$20,000, secured by certain collaterals, guaranteed the bank that if it would give up such collaterals to the corporation they should be replaced, or if not, the bank should be paid by a day named, which guaranty was accepted and acted upon: *Held*, that the contract of the signers of the agreement was that of guarantors, and that such guaranty was collateral to the debt of the corporation, which still subsisted.

2. *SAME—original or collateral contract—the rule for determining.* Whether an engagement is original or collateral, is to be determined not alone from the particular words used, but from a consideration of both the terms of the contract and the circumstances of the transaction.

3. *If the original indebtedness is extinguished, as, when the creditor surrenders his debt or demand against his original debtor and accepts the promise of a third person as a substitute therefor, such new promise is an original and direct undertaking, and binding on the maker in the first instance, and at all events. When there is no continuing liability of the original debtor, there is nothing to which a promise of another can be collateral.*

4. *SAME—promise of stockholder to pay debt of corporation.* A corporation and its stockholders are not one and the same, so that a promise by a stockholder to pay a corporation debt is, in every sense, a promise to pay the debt of another.

5. *SURETY—release—extension of time.* If a creditor, by a valid and binding agreement, without the assent of a surety, gives further time for payment to the principal debtor, the surety will be discharged.

6. *SAME—surety indemnified—extension of time no release.* A surety who is fully secured by property in his hands is estopped from objecting to any enlargement of the time of payment made by agreement between the creditor and the principal, and is not discharged by such enlargement. The burden of proof is on the creditor to show that the surety or his estate was actually indemnified.

7. *SAME—death of surety—revokes authority to extend time of payment.* The death of a surety operates as a revocation of the authority

Statement of the case.

of the principal debtor, under an agreement, to make a contract for the extension of the time of payment.

8. DEBTOR AND CREDITOR—*extension of time to one of several debtors—operating as a release of the other debtors.* Where two persons are bound for the same debt, and there is an obligation on the part of one to reimburse the other in case of payment being enforced against such other, and this is known to the creditor, then the creditor can not extend the time of payment to the party ultimately liable, without discharging the other debtor, even though such other debtor occupies the position of principal debtor to the creditor.

APPEAL from the Appellate Court for the Second District;—heard in that court on appeal from the Circuit Court of Kane county; the Hon. ISAAC G. WILSON, Judge, presiding.

On the 10th day of August, 1882, the Sycamore Marsh Harvester Manufacturing Company was indebted to the Home National Bank of Chicago, for money loaned, to the amount of \$20,000, evidenced by two promissory notes, each for the sum of \$10,000, made by said Sycamore Marsh Harvester Manufacturing Company, one dated June 5, 1882, and the other dated June 26, 1882, both payable in ninety days after date. On said 10th day of August, 1882, said bank held, by pledge of said manufacturing company, and as collateral security to said claim of said bank against said manufacturing company, nine packages of farmers' notes, so called, being notes originally taken by said manufacturing company for goods sold by it to farmers and others about the country,—said nine packages being numbered, respectively, 0302, 0413, 0568, 0653, 0654, 0655, 0659, 0662, 0663, the total amount of which notes, at their face value, was \$21,116.71. On said 10th day of August, 1882, C. W. Marsh, W. W. Marsh, William Loomis, James S. Waterman, Charles Brown, Charles Kellum and O. M. Bryan, being stockholders of said Sycamore Marsh Harvester Manufacturing Company, and owning a large majority of the stock of said company, executed and delivered to said bank their written agreement, of which the following is a copy:

Statement of the case.

"Geo. W. Fuller, Esq., Cashier Home Nat. Bank, Chicago, Ill.:

"DEAR SIR—We, the subscribers, stockholders of the Sycamore Marsh Harvester Manufacturing Company, hereby guarantee, if you will deliver to C. W. Marsh, Pres't, or to A. M. Stark, Sec., of said company, the farmers' notes now held by your bank as collateral to its claims against our said company, (said notes being contained in packages 0302, 0413, 0568, 0653, 0654, 0655, 0659, 0662, 0663, total, \$21,116.71,) for the purpose of collection, that said collaterals shall be replaced by others equally acceptable to you in character and amount, during the month of February, or if not, that you shall be paid, on or before March 1, 1883, such proportion of our company's debt, or any extension thereof made in the meantime, in cash, as said farmers' notes are held to secure.

"For the faithful performance of these conditions we hereby bind ourselves to and with you, as the cashier of said bank."

Thereupon, in consideration of the delivery of said paper to said bank, and of the undertaking of the signers thereof therein expressed, the bank delivered to C. W. Marsh, president of the company, for the company, said nine packages of farmers' notes, and said Marsh receipted for the same, in the name of the company. The notes were sent to a bank at Lincoln, Nebraska, for collection, and were paid, and the money received by the manufacturing company. No dividends were declared by the company to its stockholders after said 10th day of August, 1882, nor did Waterman, or any of the signers of the writing, receive any money from it after that date. Said collaterals, the farmers' notes mentioned, were not replaced by others during the month of February, 1883, as contemplated and provided in and by said contract, nor were they at any time either returned or replaced by others. The bank was not paid its said indebtedness referred to in said contract, on or before March 1, 1883, as therein provided, nor has it ever been paid said indebtedness in full.

Brief for the Appellant.

James S. Waterman, one of the signers of the agreement of August 10, 1882, died testate on the 19th day of July, 1883. Said indebtedness of the harvester manufacturing company to the bank was extended from time to time, upon the application of the company, until the 30th day of June, 1884. Four of the renewals of said indebtedness were made prior to July 19, 1883, and three thereafter. At the several times when such extensions were made, the old notes of the Sycamore Marsh Harvester Manufacturing Company were surrendered, and new notes were executed by said company for the indebtedness.

On the 30th day of June, 1884, the Home National Bank recovered judgment, in the Superior Court of Cook county, against said Sycamore Marsh Harvester Manufacturing Company, for the sum of \$15,925.49, that being the amount of said indebtedness then remaining unpaid, and said judgment has never been paid or satisfied.

On the first day of July, 1884, the Home National Bank filed a claim in the county court of DeKalb county, against the estate of said James S. Waterman, for the sum of \$15,932.99, based upon the aforesaid agreement dated August 10, 1882. The claim was then determined adversely to the bank, and upon an appeal to the circuit court the venue was changed to Kane county. A trial in the circuit court of Kane county resulted in a judgment in favor of the executors of Waterman, and that judgment was affirmed in the Appellate Court for the Second District. A further appeal brought the record here.

Mr. CHARLES D. F. SMITH, and Mr. WILLIAM BROWN, for the appellant:

The contract in question is an original and not a collateral one. It is not a mere guaranty of the debt of another. Chitty on Contracts, (10th Am. ed.) 546, 557; *Blank v. Dreher*, 25 Ill. 331; 12 S. & M. 595; 2 Parsons on Contracts, sec. 3;

Brief for the Appellees.

Smith v. Finch, 2 Scam. 321; *Nelson v. Boynton*, 3 Metc. 96; *Curtis v. Brown*, 5 Cush. 491; *Borchsenius v. Canutson*, 100 Ill. 82; *Allen v. Thompson*, 10 N. H. 32; *Power v. Rankin*, 114 Ill. 52.

A surety who is fully indemnified is not released by an extension of the time of payment. *Brandt on Surety*, sec. 302; *Chilton v. Robbins*, 4 Ala. 223; *Smith v. Steel*, 25 Vt. 427; *Moon v. Payne*, 12 Wend. 123.

A promise by a member of a corporation to pay the debt of the latter is within the Statute of Frauds. *Tarbell v. Stevens*, 7 Iowa, 163.

When the promise to pay the debt of another arises out of some new and original consideration of benefit or harm moving between the newly contracting parties, the subsisting liability of the original debtor is no objection to a recovery. *Prime v. Koehler*, 77 N. Y. 91; *Farley v. Cleveland*, 4 Cow. 432; *Clifford v. Luhring*, 69 Ill. 401; *Nelson v. Boynton*, 3 Metc. 400; 2 *Parsons on Contracts*, 306; *Emerson v. Slater*, 22 How. 18.

MESSRS. CARNES & DENTON, and MESSRS. WILSON & MOORE,
for the appellees:

As to what constitutes a guaranty, see *Howe v. Nichols*, 22 Me. 176; *Craft v. Isham*, 13 Conn. 28; *Mussey v. Rayner*, 22 Pick. 223; *Taylor v. Wetmore*, 10 Ohio, 400; *Bell v. Kellar*, 13 B. Mon. 381; *Hull v. Colvin*, 4 How. (Miss.) 231.

A corporation is, in law, a different person from any of its members. *Hansen v. Donkersley*, 37 Mich. 134; *Wilters v. Sowles*, 32 Fed. Rep. 767.

As to release by extension of time of payment, see *Gay v. Blanchard*, 32 La. Ann. 503; *Walton v. Beauregard*, 3 Rob. 299; *Dodgson v. Henderson*, 113 Ill. 360; *Allen v. Thompson*, 10 N. H. 32; *Baylies on Sureties*, 74.

Opinion of the Court.

Mr. JUSTICE BAKER delivered the opinion of the Court :

One principal contention of appellant is, that the agreement dated August 10, 1882, became and constituted an original and direct engagement or undertaking by Waterman and his associates signing such paper, as distinguished from a guaranty or collateral engagement to an owner for the debt of another. We will assume the correctness of this claim of appellant; but we do not understand such concession to be decisive of the case.

It is evident that the agreement was not intended or understood to work a cancellation or discontinuance of the indebtedness of the Sycamore Marsh Harvester Manufacturing Company to the bank, and that it in fact had no such effect. It makes reference to the payment, on or before March 1 after its date, of the "company's debt," and makes express provision for "any extension thereof made in the meantime," thus indicating that it was contemplated that the debt of the company to the bank should continue to exist, notwithstanding the proposed arrangement should be entered into. The notes executed by the harvester company which the bank held for its debt were not surrendered or cancelled, nor was any credit placed thereon at the time the agreement was made, but said notes were retained by the bank, and were from time to time, for a period of nearly two years, replaced by renewal notes executed by the company, thus indicating that the company was, notwithstanding the agreement of August 10, 1882, regarded and treated as a debtor of the bank for the full amount of its original indebtedness remaining unpaid.

Assuming the transaction of August 10, 1882, to have been a direct and original promise by Waterman and his associates to pay the debt, yet it does not follow that the makers of that promise were not securities for the harvester company, and were not released by the subsequent extensions of time given to that company. It is manifest that, notwithstanding that

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promise, the debt, as between the company and the signers of the writing, continued to be the debt of the company, and that had such signers paid the debt to the bank, they would have had recourse for the amount so paid, upon the company. A corporation and its stockholders are not one and the same. In *Hansen v. Donkersley*, 37 Mich. 134, it was said: "A corporation is, in law, a different person from any of its members. A promise by a stockholder to pay a corporation debt is in every sense a promise to pay the debt of another." (See, also, *Browne on the Statute of Frauds*, sec. 164.) It is also plain that the bank had full notice and knowledge of the relation which existed between said signers and the company, and that the company was the ultimate debtor.

Even if we assume, for the purposes of the decision, that the agreement contemplated renewals of the notes of the harvester company, and extensions of the time for the payment of the same, and that the necessity of procuring further consent of Waterman for the making of such renewals and extensions was thereby obviated, yet it is manifest that his death revoked all authority given by him in that behalf,—and the record shows that several renewals of the notes were made after his decease.

The rule is too well settled to require the citation of authorities, that if a creditor, by a valid and binding agreement, without the assent of a surety, gives further time for payment to the principal debtor, the surety will be discharged. We understand the doctrine to be, that where two persons are bound for the same debt, and there is an obligation on the part of one to exonerate the other, in the event of payment being enforced against such other, and this is known to the creditor, then the creditor can not extend the time of payment to the party ultimately liable without discharging the other debtor, even though such other debtor occupies the position of a principal debtor to the creditor. *Millard v. Thorn*, 56 N. Y. 402; *Colgrove v. Tollman*, 67 id. 95; *Walton v. Beau-*

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regard, 1 Rob. 301; *Gray v. Blanchard*, 32 La. Ann. 503; 1 Jones on Mortgages, (2d ed.) secs. 741, 742.

It is also claimed that Waterman and his associates were indemnified, and therefore can not avail themselves of an extension of time for payment given to the corporation. The doctrine of *Smith v. Steel*, 25 Vt. 427, and other cases cited by appellant in that behalf, is, that a surety who is fully secured by property in his hands, is estopped from objecting to any enlargement of the time of payment made by agreement between the creditor and the principal, and is not discharged by such enlargement. But we do not understand that the signers of the agreement of August 10, 1882, either were or are indemnified against loss in respect to either all or any portion of the present claim of appellant. The \$21,116.71 in farmers' notes were delivered to the corporation, and used by it for corporate purposes, and said signers received no benefit therefrom, except such as they may have received indirectly, as stockholders. In June, 1884, harvesters and binders of the estimated value of \$10,650, in the hands of agents in Dakota and Nebraska, were transferred by the harvester company to the bank, for the purpose of securing said signers, and a bill of sale therefor was delivered to the bank, and in the same month the harvester company transferred and delivered to the bank four packages of farmers' notes, amounting in the aggregate to \$10,450.08. Afterwards, under an arrangement concurred in by the bank and said signers, the harvesters and binders were disposed of, and the proceeds realized therefrom paid to the bank, and credited upon the indebtedness of the harvester company to it. The four packages of notes seem to have consisted, at least in part, of overdue paper, and the notes, by similar agreement between the bank and the signers of the agreement of August 10, 1882, were sent by the bank to the Capital National Bank of Lincoln for collection, and the collections made on said notes were remitted to appellant, and applied by it on the indebtedness

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due to it from the harvester company. It also appears that the harvester company was indebted to one C. W. Moshier, of Lincoln, Nebraska, in the sum of about \$57,000, for advances made on some \$200,000 of over-due farmers' notes, which said Moshier held and upon which he had a lien, and that in the summer of 1884 a contract was made, whereby said Moshier agreed, that after the payment of said \$57,000, with interest, and all expenses of collection, he would apply the proceeds of said notes, first to the payment of \$26,000 to one John W. Ela, and after payment of said \$26,000 to Ela, to the payment to Charles Kellum of not exceeding \$10,000, to be applied on the debt of the harvester company to appellant, for the benefit of Kellum and his associates in the agreement of August 10, 1882, etc. The evidence tends to show that said Moshier has as yet been unable to collect upon said notes sufficient to pay the amount of his prior lien thereon, and probably never will be.

The trial court properly held, in the propositions of law submitted to it, that the burden rested upon appellant to show that the estate of Waterman was actually indemnified in respect to all or a portion of the indebtedness of the harvester company charged against said estate. The court must necessarily have found, as matter of fact, that the evidence failed to show that the provision made for that purpose had actual value, and that finding having been affirmed in the Appellate Court, is conclusive.

The rulings of the court upon the several written propositions of law submitted to it at the trial, were in substantial conformity with the views herein expressed.

We find no error in the record. The judgment is affirmed.

Judgment affirmed.

MR. JUSTICE MAGRUDER, dissenting.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY

v.

CLARA BARKER *et al.**Filed at Mt. Vernon November 5, 1890.*

1. EMINENT DOMAIN—*commissioners to assess—all must act.* Under the act of 1852, relating to condemnation for right of way, the three commissioners appointed to fix the compensation and assess the damages for land taken by a railway company for right of way were all required to qualify, and must endeavor to agree. And unless all the commissioners were sworn, and acted together, their report will not authorize a judgment of condemnation.

2. Where the statute directs that three commissioners, when qualified, shall assess the damages to be paid for the taking of land for the public use, if they all qualify and meet, and attempt to agree, the decision or report of two of them will doubtless be binding; but when only two qualify or act together their award or assessment will not be binding, unless the owner ratifies the act by accepting the damages.

APPEAL from the Circuit Court of Clay county; the Hon. C. S. CONGER, Judge, presiding.

Messrs. POLLARD & WERNER, for the appellant:

The papers produced on the second trial constitute a complete condemnation proceeding. As the commissioners allowed no compensation or damages, and no appeal was taken from their decision, the right and title to the land vested in the company, with the right to enter and use the same.

Mr. RUFUS COPE, for the appellee:

The petition for the condemnation does not describe the land in question. Only two of the commissioners acted. Conceding that the award of the majority is binding, the authority is conferred upon them, and a less number are without authority to act. *Ballard v. Davis*, 31 Miss. 525; *Ex parte Rogers*, 7 Conn. 526; *Ex parte Wilcox*, id. 402; *Charles v.*

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Hoboken, 3 Dutch. 203; *Young v. Buckingham*, 5 Ohio, 485; *Dillon on Mun. Corp.* 757.

Mr. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

This case was before us at a former term, and will be found reported as *Ohio and Mississippi Ry. Co. v. Barker et al.* 125 Ill. 303. A new trial was taken under the statute, and judgment was rendered by the circuit court, upon that trial as upon the former one, in favor of the plaintiff, and the case is again before us by the appeal of the defendant.

In our opinion, the present record differs in no material respect from the record before us when the case was here before, except that upon the last trial, what purported to be the record of condemnation of the property in controversy was offered in evidence, but rejected by the court,—and this ruling presents the only question to which we think it necessary to direct our attention.

The condemnation proceedings were intended to be pursuant to the provisions of the act relating to the condemnation of right of way, approved June 22, 1852. (Laws of 1852, p. 146, *et seq.*) The second section of that act required the appointment of three commissioners to fix compensation and assess damages, etc.; and the fifth section of the act required that the commissioners appointed should be sworn, and then meet at a time and place fixed by the court or judge, "and proceed without delay, upon view and inspection of the premises, as well as upon hearing the allegations and testimony of the parties interested, to fix the compensation to be made to each party or owner of lands, etc., and to also estimate and assess the damages sustained," etc. In the event the commissioners should be unable to agree, the estimate and assessment of any two of them would, doubtless, be sufficient; but they must all qualify, and meet and hear the evidence, and endeavor to agree and decide; (*Board of Comrs. v. Lansing*, 45 N. Y. 19;)

Syllabus.

and the record failing to show a compliance with the statute in this respect, the order is a nullity. *People v. Williams*, 46 N. Y. 441; *People v. Hynds*, 30 id. 470.

The record offered in evidence shows the appointment of Henry C. Miner, Wesley Gelchin and Edward Fender as commissioners to make estimates and assess damages. Miner and Gelchin only were sworn to discharge the duties of commissioners, and the report is signed only by Miner, and also by one Holden. Even if we shall assume that the name "Holden" is written by mistake, and that "Gelchin" was intended, (as to which there is no evidence,) the report is not signed by "Fender," and the record fails to show that he was ever sworn to act as a commissioner, or that he ever did act as such. The record is therefore insufficient to divest title, and it was properly excluded as evidence by the court.

The judgment is affirmed.

Judgment affirmed.

F. M. ATKINSON *et al.*

v.

FRANK FOSTER.

Filed at Ottawa October 31, 1890.

1. **CONFESSION OF JUDGMENT**—*irregularities—time to object.* If a defendant in a judgment entered by confession desires to take advantage of mere irregularities in the entry of the judgment, it must be by application to the court in which it was entered.

2. **SAME**—*plaintiff having no interest—judgment not void—but voidable.* A judgment by confession in the name of a mere naked assignee having no real interest, is not void, but may be avoided by creditor's bill in the plaintiff's name.

3. **PARTIES**—*creditor's bill—to set aside a judgment by confession.* Where a judgment by confession has been entered in the name of a mere assignee without actual interest, a creditor's bill may be prose-

Brief for the Appellants.

cuted in the name of the nominal plaintiff in the judgment, where the defendant is deprived of no defense he might have had if the suit had been in the name of the beneficial plaintiff.

4. *SAME—want of parties—time to object.* If the latter is also a proper party, the objection that he is not made a party should be raised in the trial court, or it will be waived.

5. *PLEDGE—delivery to pledgee—as against creditor's bill.* A pledge of property can only be sustained against persons acquiring a lien by creditor's bill, when the thing pledged is actually delivered to the pledgee. In fact, a pledge, strictly speaking, can only be made by delivery.

6. A holder of certificates of stock in an incorporated company, for the purpose of securing a creditor, made an assignment thereof by a separate writing, but never indorsed, or transferred the certificates on the books of the company, or otherwise, but retained possession of them as before. While so holding the certificates they were seized by the receiver of such holder on a creditor's bill, without notice of the attempted assignment: *Held*, that the assignment passed no title as against the creditors.

7. *CHANCERY—sworn answers—two witnesses.* It is only when the defendant states facts within his knowledge, that his sworn answer must be overcome by evidence equivalent to two witnesses; and new matter set forth in the answer, not responsive to the allegations of the bill, is not evidence for the defendant.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. GWYNN GARNETT, Judge, presiding.

Messrs. G. W. & J. T. KRETZINGER, for the appellants:

Delivery, as well as indorsement, is necessary to transfer the legal title to a note. *Pardee v. Lindley*, 31 Ill. 185; *Richards v. Darst*, 51 id. 141.

In chancery, the bill must show the complainant's right to the thing demanded, or such interest in the subject matter of the suit as gives him a right to sue. 1 Daniell's Ch. Pl. and Pr. (4th ed.) 314, 316; Rev. Stat. chap. 22, sec. 49; *Hoare v. Harris*, 11 Ill. 25; *Beach v. Shaw*, 57 id. 27; *Smith v. Brittenham*, 109 id. 549; *Gorham v. Farson*, 119 id. 440.

Brief for the Appellee.

The answer, and the amendment thereto, set up a good defense to the bill, and the averments not having been denied by competent testimony, stand admitted. *Higgins v. White*, 118 Ill. 621.

In the case at bar, the averment of payment of the note and judgment stands unchallenged and uncontradicted, and if the payment of the note, or judgment confessed thereon, constitutes a good defense to a creditor's bill filed upon such judgment, then the appellee's bill should be dismissed. *Neal v. Neal*, 9 Wall. 1; *Wilson v. Stolly*, 4 McLean, 277; *Harrison v. Nixon*, 9 Pet. 505; *Duponti v. Mussy*, 4 Wash. C. C. 128.

The receiver took subject to the liens, rights and equities of others against the property. He could take no title superior to that of the party whose estate he represents. *High on Receivers*, secs. 5, 359; *Ellis v. Railroad Co.* 107 Mass. 1; *Beverly v. Brooke*, 4 Gratt. 187; *Bostwick v. Menck*, 40 N. Y. 385.

MESSRS. TRUMBULL, WILLITTS, ROBINS & TRUMBULL, and Mr. EDWARD L. UPTON, for the appellee:

If the judgment was wrongfully in the name of Foster, the remedy was by application to the court to set the same aside. *Hone v. Woolsey*, 2 Edw. Ch. 289; *Newman v. Willitts*, 60 Ill. 520.

Foster, the assignee, was both a proper and necessary party to the bill. *Scanlan v. Cobb*, 85 Ill. 300; *McGraw v. Bayard*, 96 id. 153; *Schenck v. Ellingswood*, 3 Edw. Ch. 175; *Sapp v. Phelps*, 92 Ill. 595; 1 Daniell's Ch. 200.

As to how advantage may be taken of the want of necessary parties, and waiver of the same, see *Johnson v. Thompson*, 28 Ill. 357; *Prentice v. Kimball*, 19 id. 322; *Lynch v. Rotan*, 39 id. 20; *Robinson v. Smith*, 3 Paige, 222.

The statute authorized the filing of the bill in Foster's name. *Wakeman v. Russell*, 1 Edw. Ch. 510.

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When the answer sets up new affirmative matter in avoidance, it does not require two witnesses to overcome the same. The burden as to such matters is on the defendant. *Pankey v. Raum*, 51 Ill. 88; *Tarleton v. Vietes*, 1 Gilm. 470; *White v. Morrison*, 11 Ill. 366.

By the creditor's bill, and its service, a lien was created on the effects of the judgment debtor. It has been called an equitable levy. *Miller v. Sherry*, 2 Wall. 249; *First Nat. Bank v. Gage*, 93 Ill. 172; *Davenport v. Kelley*, 42 N. Y. 193; *Corning v. White*, 2 Paige, 568.

A pledge without delivery is invalid. Story on Bailments, (8th ed.) sec. 297; *Silverman v. McGrath*, 10 Bradw. 416; *People's Bank v. Gridley*, 91 Ill. 466; Cook on Stock and Stock Brokers, secs. 463, 465; Morawetz on Corp. sec. 193.

MR. JUSTICE WILKIN delivered the opinion of the Court:

Appellee filed, in the Superior Court of Cook county, a creditor's bill against appellants, Atkinson and Smith, and others. The bill alleged the recovery of a judgment by appellee, against Atkinson, in the said Superior Court, January 19, 1887, for \$7061.11, the issuing of execution thereon, the return thereof "no property found," and that said judgment remained wholly unsatisfied. Then follow the charges usually contained in a creditor's bill, and a prayer for discovery, etc. It also prayed for the appointment of a receiver, and for an injunction.

Atkinson answered under oath, averring that the judgment described in the bill was obtained by confession upon a note executed by him to one Charles H. Ferry, who was the holder and owner thereof at the time said judgment was taken, and that complainant, Foster, had not then, or at any time, any ownership or interest therein; that two hundred shares of the capital stock of the Chicago Tire and Spring Works were deposited with Ferry as collateral security for said note, and are still held by him; "that said note has been in the hands of

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said Ferry up to within a short time, and, as defendant is advised, was paid before said judgment was confessed;" that Ferry indorsed said note to Foster about the time of entering said judgment, but retained the same in his possession, as well as the stock deposited therewith; denies "that he is indebted in any amount whatever upon said note, because he says that it had, prior to said confession of judgment, been paid by the Chicago Tire and Spring Works, by said Ferry taking from the funds of said company the money for that purpose, *as will be clearly shown upon an accounting between Ferry and said Chicago Tire and Spring Works.*" Answers were also filed by appellant Smith, and a part of the other defendants. To these answers, as well as that of Atkinson, replications were filed. Atkinson also filed a cross-bill, to which answers were duly filed, and replications thereto.

The finding and decree in the Superior Court were for appellee on the original bill, and the cross-bill of Atkinson was dismissed at his costs, for want of equity. On appeal to the Appellate Court for the First District, appellee entered his motion to strike from the record the certificate of evidence, on the ground that it was not signed by the proper judge. The motion was overruled, and the decree of the Superior Court affirmed. That decision is assigned for error here by the appellants, and appellee again enters his motion to strike out the certificate of evidence.

Our conclusion being that the decree of the Superior Court must be affirmed on the merits of the case, the arguments in support of and against the motion to strike the certificate of evidence from the record need not be considered at length. The motion will be overruled, and for the purposes of this decision the evidence shown by that certificate will be treated as the evidence in the case.

The note on which the judgment described in the bill was confessed, in fact belonged to the payee, Charles Ferry, and was assigned by him to complainant, Foster, for the purpose

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of having the judgment confessed in his name, for Ferry's benefit. The assignment was indorsed on the back of the note, and it was delivered to Foster, the assignee, and he took it to the attorney who caused the judgment to be entered.

The decree ordered the receiver to sell, among other things, one thousand shares of stock of the Munton Car Wheel Company, to which appellant Smith claims, by his answer, a prior right. November 11, 1886, Atkinson was indebted to Smith in the sum of \$6000, and agreed to transfer to him, as security, these shares of stock. A separate written assignment of the stock was made and given to Smith, but he never saw the certificates. No assignment was indorsed upon them, nor were they transferred on the company's books. They remained in the possession of Atkinson, and stood in his name when this bill was filed and the receiver appointed. Atkinson delivered these certificates to the receiver, who surrendered them to the company, and obtained new certificates therefor issued to himself. It affirmatively appears from the evidence, that neither Foster nor Ferry had any notice of the claim of Smith to these shares of stock prior to the filing of the bill and the appointment of a receiver.

Under this state of facts appellants make three points of objection to the decree below, viz: First, Foster having no right to any part of the proceeds of said note, or the judgment entered thereon, can not maintain this bill in his own name; second, that the sworn answer of Atkinson presented a good defense to the bill, and it was not overcome by the evidence; third, appellant Smith established a valid prior lien to the Munton shares of stock.

By the assignment and delivery of the note in question to Foster, by Ferry, the payee, the legal title thereto became vested in Foster, and so the legal title to the judgment entered thereon was also in him. The judgment was not void merely because the owner of the note, with or without reason, chose to transfer the legal title thereto to the plaintiff in such judg-

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ment. If the payor, Atkinson, desired to take advantage of mere irregularities in the entry of that judgment in the name of Foster, his remedy was by application to the court in which it was entered, to set it aside. (*Newman et al. v. Willitts*, 60 Ill. 519.) He might, of course, in this proceeding, call in question the validity of the judgment for want of jurisdiction, or on the ground that it was obtained by fraud, as though Ferry had himself been plaintiff in the proceeding at law and was complainant here. There is no complaint that any such defense was denied him by the Superior Court, or that he has been placed in any worse position by the assignment of the note than he would have been had Ferry retained the legal title thereto, and had brought both the action at law and this suit in his own name.

Section 49, chapter 22, of the Revised Statutes, authorized the filing of this bill by Foster, he being the party in whose name the execution was sued out. If, on the facts disclosed by the answer and proofs, Ferry also became a proper party, appellants should have raised that question below, and failing to do so, can not avail of it now. (*Robinson v. Smith*, 3 Paige Ch. 222.) In fact, by his cross-bill Atkinson did make him a party, and, so far as is shown, he was allowed to interpose all the defenses to the original bill which would have been available to him had he (Ferry) been sole complainant therein. The first point is not well taken.

The theory upon which the second ground of reversal is urged is, that the allegation of the bill that there remains due to complainant on said judgment \$7061.11 is denied by the answer of Atkinson under oath, and that such denial was not overcome by the evidence of two witnesses or its equivalent. The position can not be sustained, for the reason that the denial in the answer relied upon is not a direct and positive denial of the allegations of the bill. In one part of the answer it is said, said note has been in the hands of Ferry up to within a short time, "and, as defendant is advised, was paid

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before said judgment was confessed." In another, that on an accounting between defendants Ferry and Foster, "it will appear that there is nothing due from defendant on said note or judgment." Again, "he denies that he is indebted in any amount upon said note, *because he says* that long prior to the confession of judgment * * * said note, principal and interest, had been fully paid by the Chicago Tire and Spring Works to said Ferry, by the said Ferry taking from the funds of said company the money for that purpose, *as will be shown upon an accounting between said Ferry and the said Chicago Tire and Spring Works.*" No argument is needed to show that these allegations can not be treated as evidence of the payment or satisfaction of said note or judgment. The first only purports to be a statement on information, and the others show merely that the defendant has the means of proving facts which he concludes would establish payment, satisfaction, or show that equitably there was nothing due from him to Ferry or Foster. Suppose Atkinson had been sworn as a witness, on the hearing, and made these statements as they appear in his answer, would they have been competent evidence? It is only when the defendant states facts within his knowledge, that his answer must be overcome by evidence equivalent to the testimony of two witnesses. *Fayrear v. Lawrence*, 5 Gilm. 329; *Hitt et al. v. Ormsbee et al.* 14 Ill. 235.

That a sworn answer, in so far as it sets up new matter by way of defense, is not evidence, is too well established to require the citation of authorities. Counsel say, if the averments of the answer do not state a defense, it was incumbent upon appellee to except to it. The question here is not whether the answer presents a defense to the bill, but, is it so far responsive to the bill, in the statement of facts, as to entitle the defendant to the benefit of it, as evidence. Clearly it is not.

On the last point there is no controversy as to the facts, and it raises the naked legal question, did the paper assignment of the shares of stock by Atkinson to Smith,—the former

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retaining the exclusive control and possession of them, and there being notice to complainant or Ferry, actual or constructive, of such assignment,—vest in Smith a lien or ownership which he can assert against the receiver, who took them from Atkinson by virtue of this creditor's bill. This is not a question as to when the lien under the creditor's bill attached, but, rather, did Smith, as against creditors without notice, obtain any title or lien whatever. Here the property was actually seized by the receiver in the hands of Atkinson, to whom and in whose name it had issued and stood on the company's books. Smith had only a secret lien on it. As to the world, Atkinson had all the *indicia* of ownership, Smith none. Had Smith taken possession of the certificates at any time, a question as to when a lien under the creditor's bill attached might have arisen, as in *First Nat. Bank v. Gage et al.* 93 Ill. 172. But here the point is, to whom did the property, in law, belong, as between Smith and third parties. That a sale of personal property without delivery is invalid as to subsequent purchasers and creditors, will not be denied. That a pledge of property can only be sustained against such parties when the thing pledged is actually delivered to the pledgee, must be admitted. In fact, a pledge, strictly speaking, can only be made by delivery. The fact that the property is seized through the intervention of a receiver can make no difference as to the rights of the creditor.

We find in this record no reason for interfering with the judgment of the Appellate Court.

Judgment affirmed.

Syllabus.

THE CONSOLIDATED ICE MACHINE COMPANY *et al.*

v.

ANTON KEIFER, Admr.

Filed at Mt. Vernon November 5, 1890.

1. NEGLIGENCE—*joint liability—concurring negligence of several.* If two or more persons are jointly concerned in a particular act which occasions injury to another, they may be sued jointly, and all persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they act in concert, or unite in causing a single injury, even though acting independently of each other.

2. So where the negligence of two or more persons directly concurs to produce an injury to another, although one may have undertaken one part of the particular work and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be liable.

3. Where the owner of a brewery employs another to erect for him a refrigerator for making ice, and undertakes to furnish a support for the tank to be used as a part of the plant, and the other is to put up the tank, etc., it will be the duty of each party, in the performance of his part of the work, to use reasonable care to avoid injury to the servants of either and to third persons.

4. An ice machine company undertook to erect for a brewery company a refrigerator plant, which included a large iron tank. The latter company was to fix the location for the plant, and make and put in proper supports for the tank. When the supports were completed the agent of the machine company notified the president of the brewery company that they were not sufficient, but afterward, with this knowledge on the part of both companies, the agent of the machine company, with the approval of the brewery company, put the tank upon these insufficient supports, and commenced filling it with water, and sent one of its servants on the roof, who had no notice of the danger, and while he was on the roof the supports of the tank gave way, which caused the servant to fall with the roof, whereby he was killed: *Held*, that the companies were jointly liable in an action by the personal representative of the servant killed.

5. EVIDENCE—*joint action for negligence—evidence to show notice.* In an action against two, where concurring negligence is alleged, proof that one defendant told his co-defendant that certain supports for a water tank which was proposed to be erected by the former for the latter, were not strong enough to sustain the weight of the tank, before

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138 478
134 481
142 15
143 200
144 411

134 481
147 482

131 481
160 381
44a 525
134 481
50a 568
134 481
6Ca 170

134 481
83a 533

134 481
181 329
85a 612

134 481
182 549

134 481
184 489
87a 380

134 481
198 5155

134 481
196 562

134 481
196 565

134 481
212 205

134 481
215 186

Syllabus.

the same gave way and caused the death of a servant, is competent evidence against both defendants, in an action to recover for the servant's death, to show that both defendants had notice of the insufficiency of the supports, and therefore both were guilty of negligence.

6. *SAME—as to directions given by an agent—as affecting a question of negligence.* On a question of the joint negligence of two corporations resulting in the death of plaintiff's intestate, the directions of the superintendent of one of the companies to put certain work where the other company directed, are admissible as against his company.

7. *SAME—evidence for a particular purpose.* Where evidence is competent as to one defendant but not as to another, there will be no error in its admission, but its use and application may be limited by instructions. If evidence is proper for any purpose, its admission is not error.

8. *WITNESSES—competency—stockholder in behalf of corporation.* In an action under the statute, by the administrator of a deceased person against an incorporated company, to recover for negligence causing the death of the intestate, a stockholder in the company, being interested in the result of the litigation, is incompetent to testify as a witness in behalf of the defendant.

9. *SAME—impeachment—testimony of witness on another occasion.* In an action to recover for the death of a person, occasioned, as alleged, by negligence in the erection of certain machinery, a witness testified that if a swivel in a hog chain had not been defective a truss would have supported from sixty to a hundred thousand pounds. On cross-examination the witness admitted he testified at the coronor's inquest, and when shown the transcript of his evidence as signed by him, he was asked if he did not, on such examination, state that the hog chain, if perfect, would have sustained about thirty tons, to which he answered that he did not recollect. In rebuttal, the court allowed in evidence the deposition of the witness before the coroner showing he did so testify: *Held*, the deposition was properly admitted, by way of impeachment.

10. *MASTER AND SERVANT—liability of master for acts of servant.* In an action against a master to recover for negligence of his servant, the former can not prove the directions he gave his servant, as the servant's failure to obey instructions will not exonerate him from liability.

11. *APPEALS—finding of facts by Appellate Court—presumption.* Where the Appellate Court affirms a judgment of the trial court in favor of the plaintiff, against two corporations sued jointly, it will be presumed that the Appellate Court has found all the facts alleged which are necessary to show a joint liability.

APPEAL from the Appellate Court for the Fourth District ;—heard in that court on appeal from the City Court of East St. Louis ; the Hon. B. H. CANBY, Judge, presiding.

Statement of the case.

This was an action on the case, brought by Anton Keifer, administrator of the estate of John Keifer, deceased, against the Consolidated Ice Company and the Heim Brewing Company, both defendants being private corporations, to recover damages for causing the death of the intestate.

The declaration contains two counts, the first of which alleges, in substance, that on December 28, 1886, the intestate was, with other persons, in the employ of the defendant the ice machine company, as a laborer, in the erection of a refrigerator plant at the brewery of the defendant the Heim Brewing Company, and in the performance of his duties as such laborer, and by the direction of the officers and servants of the defendants, he was required to go upon the roof of the engine house of said brewery, upon which was erected a large tank of great weight, and which was a part of said refrigerator plant, and which tank was supported by beams and a chain, called a "hog chain," and that it then and there became and was the duty of said defendants to exercise care and prudence in providing supports for said tank, so that the same should not give way and fall, and produce injury to persons engaged in working in the erection of said refrigerator plant, but that said defendants neglected their duty in this regard, and negligently and carelessly failed to provide supports of sufficient strength to sustain said tank, and while the said John Keifer was upon the roof of said engine house, as aforesaid, and in the exercise of due care on his part, and without knowledge as to the insufficiency of said supports for said tank, because of the insufficiency of said support said tank gave way and fell, taking with it a portion of the roof of said engine house, upon which the said John Keifer was standing at the time, as aforesaid, precipitating said John Keifer into said engine house, whereby he was then, etc., killed.

The second count alleges, in substance, that the intestate, with others, was in the employ of the said Consolidated Ice Company, as a laborer, in the erection of a refrigerator plant

Statement of the case.

at the brewery of the defendant the Heim Brewing Company, and at the request of said Heim Brewing Company, and as such laborer, and by the direction of the officers and servants of said Consolidated Ice Company, he, the said John Keifer, was directed to go upon the roof of the engine house at said brewery, upon which was erected a large tank of great weight, and which was a part of said refrigerator plant, and which tank was supported by beams and a chain, called a "hog chain;" and the plaintiff avers that said support for said tank was provided and erected by said defendant the Heim Brewing Company, and it then and there became and was the duty of said last named defendant to exercise care and prudence in providing supports for said tank, and it then and there became and was the duty of said ice machine company not to undertake the erection of said refrigerator plant upon insufficient supports for the same, and to exercise care and prudence in seeing that said supports were sufficient to support said tank before undertaking the erection of said refrigerator plant, so that the same would not give way and fall, and produce injury to persons engaged in the erection of such plant, but that said defendants neglected their duties in this regard, in this, that said Heim Brewing Company negligently and carelessly failed to provide supports of sufficient strength to support said tank, and that the ice machine company negligently and carelessly undertook and attempted the erection of said refrigerator plant, when it knew, or might have known by the exercise of ordinary care and prudence, that the supports of said tank were wholly insufficient; and while said John Keifer was upon the roof of said engine house, as aforesaid, etc.,—concluding as in the first count.

Each defendant pleaded the general issue, and at the April term, 1887, the cause was tried before a jury, who returned a verdict finding both defendants guilty, and assessing plaintiff's damages at \$2500. The court overruled motions for a new trial, and rendered judgment on the verdict. Separate appeals

Briefs for the Appellants.

were prayed to the Appellate Court, and allowed. The Appellate Court affirmed the judgment, and each of the defendants appealed from such judgment of affirmance.

Mr. LEO KASSIEUR, and Mr. W. C. KUEFFNER, for the appellant the Consolidated Ice Company:

The opinions of witnesses as to the sufficiency of the supports were inadmissible. *Lawson on Expert Testimony*, 3; *Chicago v. McGiven*, 78 Ill. 349; *Linn v. Sigsbee*, 67 id. 75; *Fairbury v. Rogers*, 98 id. 554.

A witness can not be impeached by proof of contradictory statements out of court, unless his attention has been directed, on his examination, to those contradictory statements, specifying particularly time and place. *Richardson v. Kelly*, 85 Ill. 493; *Reginer v. Cabot*, 2 Gilm. 34; *Root v. Wood*, 34 Ill. 283; *Miner v. Phillips*, 42 id. 123; *Winslow v. Newlan*, 45 id. 145.

Mr. M. MILLARD, for the appellant the Heim Brewing Company:

Parties are not jointly liable for a tort unless they co-operate or unite in its commission, or if it arises from a breach of duty; or, in case of negligence, unless they sustain the same relation to the defendant,—that is, owe him the same duty at the same time, and for the same reason.

The plaintiff, here, is suing his own master for a breach of duty, and has joined with him another party who was not sustaining that relation to him, for the breach of another duty, and the declaration charges these breaches as separate acts of negligence. It does not allege a joint duty, and is not based upon the theory of joint action or neglect, and, therefore, does not show a joint liability. Instead of charging concerted action it alleges separate conduct, and as the wrongful act of one party rests upon the rights of a servant against his master, and of the other upon the rights of a person who is in

Brief for the Appellee.

no way related to the wrongdoer, it is clear that these causes of action can not be joined in the same suit. *Yeazel v. Alexander*, 58 Ill. 254; *Railway Co. v. Scates*, 90 id. 586.

The accident was caused by a latent defect in the swivel, which was hidden from view, and was not visible to the eye. In such case there is no liability, because there is no negligence. Beach on Contributory Neg. sec. 133; *Malone v. Hathaway*, 64 N. Y. 5; *Railroad Co. v. Kenney*, 58 Ga. 485; *Ladd v. Railroad Co.* 119 Mass. 412; *Ford v. Railroad Co.* 110 id. 240; *Ruby v. Steamship Co.* 29 La. Ann. 791; *Murphy v. Railroad Co.* 88 N. Y. 146.

Even in railway cases, where the highest degree of care is exacted, the rule is enforced. *Railroad Co. v. Phillips*, 49 Ill. 237; *Railroad Co. v. Conroy*, 68 id. 567.

The court erred in admitting proof of the statements of Dennerty, the foreman of the ice company, as evidence against the brewing company. 1 Greenleaf on Evidence, sec. 176; *Daniels v. Potter*, M. & M. 501.

Mr. G. B. BURNETT, Mr. R. A. HALBERT, and Messrs. FLANNIGEN & RAFTER, for the appellee:

The proof shows that both defendants were acting in concert, and co-operating to effect a common purpose,—the erection of the refrigerator plant; that Gohn, (Heim's carpenter,) consulting with Dennerty, the superintendent of the ice company, was present, and that deceased was killed through the means of this concurring negligence. The proof brings the case within the rule in *Yeazel v. Alexander*, 58 Ill. 254.

If two or more persons are jointly concerned in a particular act resulting in injury to another, they may be sued jointly. So far has this been carried, that it is held in Massachusetts that one who superintends, although gratuitously, and not under contract, work done on premises of another, and through whose negligence, as well as of such other, an injury occurs, is liable therefor in an action against him and such other,

Brief for the Appellee.

jointly. Wharton on Negligence, sec. 788; *Hawkesworth v. Thompson*, 98 Mass. 77.

It is a familiar rule, that if the concurrent or successive negligence of two persons, combined together, results in an injury to a third person, the party injured may recover damages of either, or both. Thompson on Negligence, 1088, and authorities there cited.

In this case, the deceased lost his life through the concurring and successive negligence of the ice machine company and the brewing company, combined, and the action may be maintained against them either severally or jointly. *Railway Co. v. Shacklet*, 105 Ill. 364.

There was no error in the admission of evidence.

A stockholder was incompetent at common law, on the ground of interest. 1 Phillips on Evidence, 39; *Ryder v. Railroad Co.* 13 Ill. 516.

If the intestate was the servant of the brewing company, that company could, by proof of directions given by it, shift the responsibility on another servant. *Hutchinson v. Railroad Co.* 6 Eng. Ry. and Canal Cases, 442; *Railway Co. v. Swett*, 45 Ill. 197.

A direction given to a foreman, which, if followed, would have prevented injury to a servant, is not sufficient, in law, to exonerate the master from liability. *Avilla v. Nash*, 117 Mass. 318.

In all cases the master must show that he in fact adopted such precautions as ordinary prudence suggests, and failing in that, he is liable, although the injury resulted in part from the negligence of a co-servant. *Cayzer v. Taylor*, 10 Gray, 274.

The rule is, to hold the master liable for negligence in the performance of the duties he has impliedly contracted to perform toward the servant, among which is the duty of selecting suitable and safe appliances, no matter whether he attempts to perform them in person or by another; and he can not be permitted to show that he had instructed the latter to make

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the structure safe. It is immaterial what instructions he gave his servant in respect to building the structure. If the latter was negligent, his negligence in this regard is the negligence of the master, as before stated, and the master is liable, notwithstanding such instructions. Wood on Master and Servant, 860; *Fuller v. Jewett*, 80 N. Y. 52; *Booth v. Railroad Co.* 73 id. 40; *Herbet v. Railroad Co.* 116 U. S. 642; Beach on Contributory Neg. sec. 130; Wharton on Negligence, sec. 232, note; Patterson on Ry. Accidents, 329, 330.

If the deceased is not to be considered a servant of the brewing company, then his relation to that company was that of one who was impliedly invited by it upon its premises. In such case, the duty of the brewing company was to warn the deceased of any danger of which the brewing company had knowledge, or of which it ought to have had knowledge, and of which the deceased was not aware. *Sanderson v. Cleveland, etc., Co.* 49 Mich. 164; *Coughtry v. Woolen Co.* 56 N. Y. 124.

Such being the law, it was not competent for the brewing company to prove that it had instructed its foreman to build a good and strong truss, because whether or not it had given such instructions was wholly immaterial.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

The judgment of affirmance rendered by the Appellate Court is conclusive upon all questions of fact. It must be presumed that the facts were found to be sufficient to maintain the plaintiff's cause of action against each of the defendants, and that the negligent conduct of each contributed to the death of the intestate.

The principal question arises upon objection to the first instruction given at the instance of plaintiff. That instruction told the jury, in effect, that if the evidence warranted, they might find either or both of the defendants guilty, and was, as said by counsel, "based upon the supposition that there was

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a joint liability." It is insisted, with great earnestness, that these defendants could not be jointly liable, because, as it is said, they did not co-operate and unite in the commission of a tort, and, in respect of their negligence, that the brewing company owed the deceased no duty, and that where negligence is relied upon as the ground of recovery, the duty must be joint in order to make the liability joint. If this was so, it would necessarily be presumed, from the judgment of affirmance, that the facts sustained the right of recovery. Upon looking into the evidence, however, it will be found that it sustains the allegations of the declaration. It is shown that the ice machine company undertook to erect a refrigerator plant for the brewing company, at its brewery, which included a large iron tank. The brewing company was to fix the location for the plant, and make and put in proper supports for the tank. It selected its engine room for this purpose, and the iron tank was to be set upon supports eighteen or twenty feet from the ground. To do this, part of the roof of the engine house was cut away, and one side of the tank was to rest upon one wall of the engine room, and the other was supported by a truss made of two wooden beams, fourteen inches wide and seven inches thick, twenty-four feet long, bolted together, and these beams were further strengthened by a hog chain. The hog chain consisted of two iron rods, anchored, one in the north and the other in the south wall of the engine room, and joined together in the center of the supporting beams by a swivel. Timbers were laid from this truss to and upon the east wall of the engine house, and upon this structure the iron tank was placed, extending three feet over the beam, so that the greater portion of the weight of the tank rested upon the truss. It is shown that when the truss was completed the superintendent of the ice machine company told the president of the brewing company that it was insufficient, and never would support the tank, who replied, in substance, that it would do. Without further objection the ice machine com-

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pany placed the tank on the support, as intended by the brewing company. After the tank was up, the superintendent of the ice machine company directed the intestate, with others, to go upon the roof of the engine house and fit in it the heater. The tank was, at the time, being filled with water, and while the intestate was on the roof, in compliance with such direction, the truss gave way, the tank fell, taking with it part of the roof of the engine house, and precipitating Keifer to the floor of the engine room, whereby he was killed.

Under the state of facts alleged and shown, it was the duty of each of the defendants, in the performance of their several parts of the work, to use reasonable care to avoid injury to the servants of either, and to third persons. If Dennerty, the superintendent of the ice machine company, knew, as he told Heim, that the truss provided by the brewing company would not support the tank, he was guilty of negligence in sending the intestate to work upon the tank while it was being filled with water. On the other hand, it was the plain duty of the brewing company, when it undertook to provide the support, to make it sufficient to sustain the tank when filled with water. The purpose of the erection of the tank was that it might be filled with water, and the disastrous consequences of an insufficient support could be readily foreseen. That the tank fell because of the insufficient support furnished by the brewing company is determined by the judgment of the Appellate Court. But if this were not so, there is evidence tending to show it was wholly insufficient, and that knowledge thereof was brought home to the brewing company before the tank was placed thereon.

It is, however, claimed, that if either defendant has been guilty of negligence resulting in injury to the intestate, it is their several negligence, and can not be charged against the other defendant. The evidence shows, beyond dispute, that both defendants, in respect to the matters being considered, were acting together to accomplish a common purpose. It is

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true the work was apportioned among them; but this does not change the common purpose and object of their several acts. The brewing company, as we have seen, was to fix the location of the plant, and provide the truss or support for the tank. When this was done, the ice machine company was to erect a plant, and put the tank upon the support so furnished. The parts acted by each company looked alone to the erection and completion of the refrigerator plant. As said by the Appellate Court: "The brewing company was negligent in providing a structure which was unsafe and insufficient, whereby deceased incurred an extra peril, when at his work, not incident to his employment. The ice machine company was negligent in directing deceased to work in this place of danger, it having knowledge, and he being without notice or knowledge, of such danger, and the successive concurrent negligence of appellants thus united in causing the death of Keifer."

In Cooley on Torts, (1st ed.) 684, it is said: "In general, the negligence of third parties concurring with that of the defendant to produce an injury, is no defense. It could, at most, only render the third party liable to be sued also, as a joint wrongdoer." (*Pennsylvania Railroad Co. v. Mahoney*, 57 Pa. St. 187; *Cleveland and C., etc., Railroad Co. v. Piny*, 8 Ohio St. 570.) In Hilliard on Remedies for Torts, 178, the law is thus stated: "One injured by the concurrent negligence of two persons may maintain a joint action against them. Thus, where the trains of two companies using the same track come in collision, an action is maintainable against them jointly for the injuries incurred." (*Colegrove v. New York and New Haven Railroad Co.* 20 N. Y. 492.) Deering, in his work on Negligence, sec. 395, says: "An action lies against two persons jointly superintending a work, which was so negligently done that it caused injury to the plaintiff; and it makes no difference that one rendered his services to the other gratuitously." (*Hocksworth v. Thompson*, 98 Mass. 419.) And again: "When separate and independent acts of negligence of two persons are

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the direct cause of a single injury to a third person, it is impossible to determine in what proportion each contributes to the injury. Either is responsible for the whole injury, and this though his act, alone, might not have caused an injury, and though, without fault on his part, the same damages would have resulted from the act of the other." (See *Slater v. Mersereau*, 64 N. Y. 128.) In Wharton on Negligence, sec. 788, the rule is stated to be, that "if two or more persons are jointly concerned in a particular act they may be sued jointly." And so, if several persons are jointly bound to perform a duty, they are jointly and severally liable for omitting to perform or for performing it negligently. All persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they acted in concert, or united in causing a single injury, even though acting independent of each other. (1 Shearman & Redfield on Negligence, sec. 122.) In *Cuddy v. Horn*, 46 Mich. 596, it was held that an act wrongfully done by the joint agency or co-operation of several persons, or done contemporaneously by them without concert, renders them liable; and it was held, that if a passenger on one vessel is injured by its collision with another in consequence of the negligence of the officers of both, he has a right of action against them jointly. (See, also, *Stone v. Dickinson*, 5 Allen, 81; *Cooper v. E. T. Co.* 75 N. Y. 116; 2 Thompson on Negligence, 1088.) In *Wabash, St. Louis and Pacific Ry. Co. v. Shacklet*, 105 Ill. 364, which was a case where a passenger upon one train of cars was killed by the collision with the train of another company using the same track, through the mutual negligence of the servants of the two companies, we said: "We are of opinion that public interests will be best subserved by adhering strictly to the long and well established principle, that one who has received an actionable injury at the hands of two or more wrongdoers, all, however numerous, are severally liable to him for the full amount of damages occasioned by such injury, and the plaintiff, in such case, has his election to sue all jointly, or he may

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bring his separate action against each or any one of the wrongdoers."

There can, in such case, be no apportionment of damages as between the several parties whose negligent acts and conduct have contributed to the injury. Nor can one of the wrongdoers compel contribution from the other. There can be but one recovery for the damages sustained, and this, as we have seen, may be several as against each wrongdoer whose act or negligent conduct has contributed to produce the injurious result; and where the negligence of two or more persons directly concurs to produce the injury, although one may have undertaken one part and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be jointly liable. The test seems to be, whether or not the negligence of each directly contributed in producing the injurious result. Here, the brewing company intended that its defective support should be used as it was used, and it having express notice of the insufficiency thereof, it became responsible to any one injured, while exercising due care, from the use to which it was thus applied by its direction and supervision; and the ice machine company, with knowledge of its insufficiency, went on and placed the tank thereon, and thereby became responsible for injuries to any of its servants it might send to work upon the tank, without giving them notice of the danger to which they were exposed. Here, the negligence of each of these defendants directly concurred in producing the death of Keifer.

It is urged that the court erred in the admission of evidence. The witnesses Marion and Gaines testified at the trial, that if the swivel in the hog chain had not been defective the truss would have supported from sixty to one hundred thousand pounds. On cross-examination, plaintiff showed by them that they testified at the coroner's inquest upon the body of Keifer, and having identified the transcript of their testimony, as

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taken down by the coroner, and signed by them, they were asked if they did not state in that examination that the hog chain, if perfect, would have sustained about thirty tons, to which they answered they did not recollect. Plaintiff, in rebuttal, introduced in evidence that portion of the witnesses' testimony to which their attention had been called, which showed they did so testify. Their deposition before the coroner had been read to and signed by these witnesses, and on cross-examination their attention had been particularly directed thereto. This evidence was offered by way of impeachment, and was entirely competent. The mode of examination seems to have conformed to the rule in reference to examinations in respect of written instruments. 1 Greenleaf on Evidence, 452-465.

It is also insisted by the defendant the brewing company, that the statements and declarations of Dennerty, the superintendent of the ice machine company, were improperly admitted in evidence. The testimony to which this objection applies is that of the witness Stith, that he had heard Dennerty tell the man who built the tank and brought it to the brewery, to put it where the brewing company told him to put it, and to Dennerty's own testimony, that he told Heim that the supports were not strong enough to sustain the weight of the tank. In respect of the latter it is clearly competent against both defendants, as tending to show that each, prior to the erection of the tank, had notice of the insufficiency of the truss to sustain the weight to which it was to be subjected. The testimony of Stith was clearly competent as against the ice machine company. Dennerty was its superintendent in charge of the work, and his direction was the direction of his company. If incompetent as against the brewing company, the rule would be, that it must be admitted against the defendant in respect of whom it is competent, and its use and application limited by proper instructions. If the testimony was proper for any purpose, its admission was not error. The

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plaintiff here sues in a representative capacity, and the defendants, if natural persons, would have been incompetent to testify as witnesses in the cause. The brewing company was a corporation, and Heim, being its president and a stockholder therein, was interested, and therefore incompetent to testify generally on behalf of the corporation, when called adversely to the plaintiff. At common law, a stockholder, being interested in the event of the litigation, was not allowed to testify generally in favor of the corporation. *Thrasher v. Pike County Railroad Co.* 25 Ill. 393.

It is urged that the court erred in refusing to allow the defendant the brewing company to prove its directions to its foreman to build a sufficient truss. This is not error of which that company can complain. Its foreman did afterwards testify, without objection, to the directions given him. But if this was not so, the master is liable for the acts of his servant within the scope of his employment. The act of the servant in providing the structure, was, in law, that of his employer, and the servant's failure to obey instructions will not exonerate the master. *Chicago and Northwestern Ry. Co. v. Swett, Admr.* 45 Ill. 197; Wood on Master and Servant, 860; Beach on Contributory Negligence, sec. 130; Wharton on Negligence, sec. 232, note; Patterson on Railway Accidents, 329, 330.

We have carefully considered the several points made by counsel, and are of opinion that there is in this record no error requiring a reversal of the judgment of the Appellate Court, and it will accordingly be affirmed.

Judgment affirmed.

Syllabus.

GEORGE HUNT, Attorney General, *ex rel.* City of Streator,

v.

JESSIE S. EVANS *et al.*

Filed at Ottawa October 31, 1890.

1. **WILLS—recitals in a will—misrecital, as to other parts of the will, and as to instruments outside of the will.** Where a will recites that the testator has devised something in another part of the will when in fact he has not done so, such recital will be construed to show a purpose and intention of the testator to devise by the will, and the courts will carry out such intention, and thus give the erroneous recital the effect of a devise by implication.

2. But where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when in fact he has not done so, such erroneous recital will not disclose a purpose and intent to give by the will, and resort must be had to the other instrument, and not to the will.

3. A testator, after making certain devises, recited in his will that he had conveyed in trust to W. and P., as trustees, certain property, described in the trust deed, for the purpose and upon the trusts mentioned in such deed of trust, reserving the rents, etc., during his life, and upon his death the residue to be vested in a board of directors with intent to establish, under the statute, a public library for the use of the inhabitants of the city of S., upon complying with the directions and trusts named in said deed of trust. The will and deed of trust were both prepared, but the will only was executed: *Held*, that the recital in the will in respect of the creation of a trust could not be construed as a devise of anything, or as a declaration of a trust for the benefit of a public library.

4. **SAME—disputing recital in will—devisees and heirs not estopped.** The devisees and heirs of a testator are not estopped by the recitals in his will that he had conveyed certain property to trustees, in trust for a certain purpose, from denying the execution of any such deed. The rule in *Gorham v. Dodge*, 122 Ill. 528, has no application to such a case.

5. **SAME—separate instrument as part of a will.** A will and a conveyance in trust were prepared in blank at the same time, and the will recited the fact of the execution of the deed, in trust, etc. The will alone was executed: *Held*, that the blank deed of trust was not made a part of the will by the recital in the latter.

Briefs for the Appellants.

6. One instrument can not be engrafted into another, and become a part thereof, unless the language used manifests an intention that such shall be done. But an instrument not executed or in existence when another is made can not form a part of the latter.

7. TRUST—*creation of a trust—of the mode.* Under section 9 of the Statute of Frauds a trust must be proved by a writing signed by the party who may create or declare the same, or by a last will in writing. But a bare recital in a will that the testator has conveyed property in trust to persons named is not a devise of such property in trust.

APPEAL from the Circuit Court of La Salle county; the Hon. DORRANCE DIBELL, Judge, presiding.

MESSRS. DUNCAN & GILBERT, for the appellants:

The fact that a deed of trust to Williams and Plumb was executed is conclusively established by the recital in the will. *Denn v. Cornell*, 3 Johns. Cas. 174; *Terry v. Bank of Orleans*, 9 Paige, 659; *Carver v. Jackson*, 4 Pet. 80; *Byrne v. Morehouse*, 22 Ill. 603; *Pinckard v. Milmine*, 76 id. 453; *Orthwein v. Thomas*, 127 id. 554; *Douglass v. Scott*, 5 Ohio, 195; *Doe v. Porter*, 3 Ark. 18; *Bradstreet v. Clarke*, 12 Wend. 670; *Jackson v. Parkhurst*, 9 id. 209; *Crane v. Morris*, 6 Pet. 611; *Williams v. Keyser*, 11 Fla. 234; *Jackson v. Brooks*, 8 Wend. 426; *Lee v. Clarke*, 1 Hill, 56; *Thompson v. Thompson*, 19 Me. 235; *Graff v. Castleman*, 5 Rand. (Va.) 195.

The recital is a good and valid declaration of trust in favor of the charity specified in the will. *Day v. Roth*, 18 N. Y. 453; *Hill on Trustees*, 130; *Wright v. Douglass*, 7 N. Y. 564.

Upon the subject of the declaration of trusts, see *Perry on Trusts*, secs. 81, 82, 91; *Cook v. Barr*, 44 N. Y. 159; *Sheets' Estate*, 52 Pa. St. 527; *Gomez v. Traders' Bank*, 4 Sandf. 102; *Sheldon's Appeal*, 31 Conn. 548; *Richardson v. Richardson*, L. R. 3 Eq. Cas. 686; *Story's Eq. Jur.* sec. 976.

MR. JOHN BURNS, for the appellants Williams and Plumb:

The general intent of the testator, in the construction of wills, is the pole star which guides the mind of the chancellor, and determines his judgment in all cases when that intent

 Brief for the Appellees.

can be gathered from the provisions of the will, when considered as an entire document. *Willis v. Watson*, 4 Scam. 64; *Welsch v. Savings Bank*, 94 Ill. 191; *Smyth v. Taylor*, 21 id. 296; *Holliday v. Dixon*, 27 id. 33.

The intention to create a trust is manifest. 1 Perry on Trusts, (3d ed.) p. 68, pars. 82-84.

The blank trust deed, if intended as the one named as a trust deed, was necessarily referred to by the testator as an adjunct to the will, and the law will so construe the intention of the testator, as it adds important provisions to the will, and must be incorporated with it and construed with it.

Redfield says, any paper may be referred to, so as to become a part of the will, in order to ascertain the real intention of the testator in the disposition of his estate. It must be in existence at the time, and identified as the paper referred to. 1 Redfield on Wills, (3d ed.) 261-268; *Habergan v. Vincent*, 2 Ves. Jr. 204; 1 Jarman on Wills, (ed. of 1861,) 84, and cases cited. See cases cited in Redfield, on pages 264, 265.

Mr. WALTER REEVES, for the appellees:

As to the effect to be given to an erroneous recital in a will, see *Harris v. Harris*, 3 Irish Eq. 610; *Circuit v. Perry*, 23 Beav. 275; *Lane v. Wilkins*, 10 East, 365; *Smith v. Maitland*, 1 Ves. Jr. 362; *Wright v. Hammond*, 1 Strange, 427; *Adams v. Adams*, 1 Hare, 538; *Theobald on Wills*, (2d ed.) 574; *Beach on Wills*, secs. 335, 334; 2 Redfield on Wills, 381; 1 Jarman on Wills, (5th ed.) 526.

The will does not declare a trust. *Roth v. Michalis*, 125 Ill. 332; *Jones v. Jones*, 124 id. 263; *Phillips v. Park Comrs.* 119 id. 638; *Freer v. Lake*, 115 id. 662; *Mills v. Newberry*, 112 id. 132; 1 Perry on Trusts, secs. 13, 14, 28, 90, 91, 739.

As to estoppel of devisees to dispute the recitals of a will, see *Bigelow on Estoppel*, (5th ed.) 365, 382; *Smith v. Wait*, 4 Barb. 28; *Pervine v. Gheenman*, 19 Am. Dec. 388; *Mills v. Graves*, 38 Ill. 455; 1 Greenleaf on Evidence, sec. 285.

Opinion of the Court.

Mr. JUSTICE CRAIG delivered the opinion of the Court :

This was an information in chancery, brought by the Attorney General, at and by the relation of the city of Streator, in the circuit court of La Salle county, to establish a charity. There is no controversy in relation to facts. Edwin Evans died at Streator on the 5th day of May, 1889, leaving a widow, Jessie S. Evans, and Helen Amelia Haskell, an only child and heir-at-law. The will of the deceased was admitted to probate on the third day of June, 1889. He left an estate, consisting mainly of real estate, of about the value of \$100,000. The deceased devised to his wife (except as provided in the residuary clause of the will) but a small portion of his estate, and to his daughter he bequeathed a large arm-chair. The testator bequeathed to his sister, Harriet Augusta Zeilman, a mortgage held on her husband's farm, and the will contained the following declaration :

"*First*—I have made a deed *in escrow* to said Harriet Augusta, my sister last named, of the west half of lot six (6), in block nineteen (19), in Streator, Illinois, excepting the upper room leased to the Odd Fellows Society, denominated Streator Lodge No. 602, I. O. O. F., which is to be devoted to her use, my said sister, as provided by said deed, which deed is in possession of Olive A. Linsley, of Streator, Illinois, to be delivered to grantee upon the conditions named in said deed.

"*Second*—I have also conveyed to one Miss Olive A. Linsley, of Streator, Illinois, *in escrow*, by deed, certain property, which deed is now held by Mrs. Harriet E. Baker, of Auburn, New York, and to be delivered to the grantee by her upon my death, as well as the deed held by the custodian for the use of my said sister, Harriet Augusta Zeilman.

"*Third*—I have also conveyed, by deed *in escrow*, for the use of Ruby A. Ingmire, of No. 99 Lexington avenue, Albany, New York, certain property in Streator, Illinois, which I have devoted to her use on my death, which deed is also held in pos-

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session of Mrs. Harriet E. Baker, of Auburn, New York, which deeds *in escrow* severally describe the property to be conveyed by said deeds *in escrow*, and are not intended to be devised by this will, but reserved for the use of the grantees in said deeds, according to directions thereto annexed."

The will also contained the following declaration:

"I have deeded in trust to Prof. R. Williams and Fawcett Plumb, as trustees, seven lots on Main street, in Streator, La Salle county, Illinois, with six store buildings, which lots are described in said deed of trust, for the purpose and upon the trusts mentioned in said last named deed, reserving to myself, during my natural life, the rents, issues and profits thereof, and upon my death the residue of said estate to be vested in such body of directors as shall be appointed and qualified, with intent to establish; under the statutes of the State of Illinois, a public library for the use of the inhabitants of said city of Streator, upon complying with the directions and trusts provided by said trust deed. The residue estate which I may have, if any, not disposed of by the *escrow* deeds mentioned herein, the deed of trust herein mentioned, and the specific devises and bequests provided for by this my last will and testament, I give, devise and bequeath to my beloved wife."

The three deeds mentioned as having been made *in escrow* were all duly executed, and found in the possession of the persons named in the will, but no deed in trust to Williams and Plumb, as trustees, conveying property to establish a public library, was found, and it appears from the evidence that no such deed was ever executed. A short time before the death of Evans he caused Judge Burns to prepare the draft of a deed of trust for the conveyance of the lots mentioned in the will, to R. Williams and Fawcett Plumb, a blank space being left for the insertion of the description of the property. At the same time he also caused Judge Burns to prepare a draft of his last will and testament. The draft of the deed of trust and the will, when completed, were taken by Evans

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to his residence, unexecuted. On the evening of May 4, Mr. Williams called at the residence of Evans, and the draft of the deed of trust was read over and its contents discussed, but it was not executed, and when Williams left for home he took the draft with him for further examination. At about 1:30 o'clock A. M. of May 5, Evans became quite ill, and realizing that death was near, he executed the will which Burns had prepared, and at about 5 o'clock A. M. he died.

In the will of Edwin Evans, which was admitted to probate, the testator declared, in plain terms, that he had deeded, in trust, to Prof. R. Williams and Fawcett Plumb, as trustees, seven lots on Main street, in Streator, La Salle county, Illinois, with six store buildings, which lots are described in said deed of trust, and the real question involved is, what force and effect are to be given to this recital or declaration. In behalf of appellants it is contended, that the fact that a deed of trust to Williams and Plumb was executed, is conclusively established by the recital in the will. As was said before, no deed of trust was in fact executed. The recital was therefore erroneous, and the question to be determined is, what effect shall be given to an erroneous recital in a will.

While the authorities may not be entirely harmonious, we think the decided weight of authority establishes the doctrine, that where the recital is to the effect that the testator has devised something in another part of the will, when in fact he or she has not done so, and thus the recital turns out to be erroneous, then such recital is construed to show a purpose and intention of the testator to devise by the will, and the courts carry out such purpose and intent to devise by the will, and give such erroneous recital the effect of a devise by implication. But where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when, in truth and in fact, he has not done so, such an erroneous recital does not disclose a purpose and intent on the part of the

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devisor to give by the will, and, in such case, resort must be had to the other instrument, and not to the will, by persons interested. *Harris v. Harris*, 3 Eq. Irish Rep. 610, is a leading case on the subject. It is there said: "The doctrine as to the effect of erroneous recitals in wills is well established, namely, that if the erroneous recital in a testamentary instrument be of a gift contained in that instrument, the recital may operate as being in itself a devise or bequest, by implication, of that very property. But when the erroneous recital refers to an estate created by another instrument, that recital can not operate to create an estate by implication." See, also, *Adams v. Adams*, 1 Hare, (23 Eng. Ch. Rep.) 538; *Holten v. White*, 3 Zab. (N. J.) 330; *Hurlbut v. Hutton*, 42 N. J. 15; *Marsh v. Hayne*, 1 Edw. Ch. 103; Beach on Wills, sec. 335; Theobald on Wills, (2d ed.) 574; 2 Redfield on Wills, (4th ed.) 381; 1 Jarman on Wills, (5th ed.) 526. Here, the recital has no reference whatever to a gift or devise created by or under the will, but it refers to a deed of trust,—an instrument in no manner connected with the will under which the title to the property passed; and, under the rule announced, reliance can not be placed on the erroneous recital in the will to pass the title to the property to the persons named as trustees in that recital.

It is also contended that the recital is a good and valid declaration of trust, and, as such, may be enforced in favor of Williams and Plumb, trustees. The ninth section of our Statute of Frauds provides: "All declarations or creations of trusts or confidences of any lands, tenements or hereditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect: *Provided*, that resulting trusts, or trusts created by construction, implication or operation of law, need not be in writing, and the same may be proved by parol." Under this statute, a trust must be proved by a writing signed by the

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party who may create or declare the trust, or by a last will in writing. Here, the property involved was owned by Edwin Evans. He executed no deed conveying the property in trust. He executed no paper in which he declared that he held the property in a fiduciary capacity. A trust might have been created in either of the modes indicated, but it was not done. Under the statute, a trust may be manifested and proved by a last will and testament; but was that done in this case? A will was executed, but it contains no provision devising the property in trust to any person or for any purpose. No attempt is made by any provision of the will to devise the property for any specified purpose. The will contains nothing on the subject, except a bare declaration or statement that the testator had deeded in trust to R. Williams and Fawcett Plumb, as trustees, seven lots in Streator, La Salle county, Illinois, which lots are described in the deed of trust, for the purpose and upon the trusts mentioned in the deed. The fact that Evans may have made a deed, in and by which he had conveyed certain property in trust, as he declared in the will he had done, was not a devise of property in trust, nor could it be held to be a declaration of trust signed by him. The clause in the will can be regarded as nothing more than a mere statement or declaration that Edwin Evans had, by a certain deed, conveyed certain property in trust. But the evidence that a trust had been created would be the deed itself, and not the declaration named in the will.

It is also insisted that the intention of the testator to give the property for a public library is manifest from the will, and that intention should be carried out in placing a construction on the will. That Edwin Evans contemplated a conveyance of the property involved, in trust, for a public library in Streator, at the time he procured a will and deed of trust to be drafted, may be true; but whatever may have been his intention at that time, we think it is apparent, from the evidence, that he changed his mind before his death. When he

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executed the will he knew that death was approaching. He knew that he had not executed the deed of trust. He knew that it had been taken from his house by Williams a few hours before, and he was in a position to have it returned and executed, had he desired it. Under such circumstances, the fact that the deed of trust was not mentioned when the will was executed seems to show plainly that he had changed his mind. But if we are not correct in this, and resort to the terms of the will for the intention of the testator, there is nothing contained in the will to disclose an intent to devise this property in trust.

It is also claimed that appellees are estopped from denying the truth of the recitals in the will. This position is predicated on the principle recognized by this court in *Gorham v. Dodge*, 122 Ill. 528, and other like cases, where it was held that a person can not, as devisee, take a beneficial interest under a will, and at the same time set up a claim which will defeat some other provision of the will. We fully recognize the rule of law as declared in the cases cited, but the doctrine announced has no application to the facts of this case. Here, appellees are not setting up any claim which will defeat any provision of the will, nor do they undertake to set up a claim which will hinder or prevent any part of the testator's property from passing to any devisee under the will. As has been seen, the Streater property was not devised to Williams and Plumb by the will. They were not devisees. If they hold the property, they do not hold it under the will, but under a deed of trust. Under such circumstances, we do not think the doctrine of estoppel has any application.

It is also contended that the blank unexecuted trust deed, by force of the recital in the will, became a part of the will, and that the two instruments together create a trust. One instrument can not be engrafted into another, and become a part thereof, unless the language used manifests an intention that such should be done. Here the recital contains no lan-

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guage from which it can be inferred that Evans intended to make the blank trust deed a part of the will. There is another answer to the proposition. The recital refers to a trust deed, —not a blank unexecuted instrument, but to an executed instrument; and we are aware of no authority holding that an instrument can be made a part of a will by a recital, unless the instrument was executed and in existence when the will was made.

It follows, from what has been said, that the decree of the circuit court was correct, and it will be affirmed.

Decree affirmed.

DANIEL ZIMMER *et al.*

v.

JOHN SENNOTT.

Filed at Mt. Vernon November 5, 1890.

1. *WILLS*—devise of rents and profits of land—operating as a devise of the land itself. A devise of the rents, income and profits of land is equivalent to a devise of the land itself.

2. *SAME*—of the estate devised—whether a trust is created. A testator devised to his wife as follows: "All the rents, income and profits arising from all my real estate which I may own, (excepting certain specified property,) until the eldest one of my children has attained the age of eighteen years, upon condition that my said wife shall raise, support and educate my children until they respectively have attained the age of eighteen years, after which my wife shall receive one-third, only, of the net rents and income of such real estate, the other two-thirds to be paid to and equally divided among my children by my present wife." *Held*, that the wife took an interest in the land as a devisee, which was liable to sale on execution against her, and that she did not hold such title as trustee for the testator's children.

3. If the testator had expressed a wish, expectation, hope, desire or request that the devisee should devise the rents, profits and income to the benefit of his children, a trust might have been created in favor of the children. The mere expression of the motive of a gift or grant is

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134	505
170	388

134	505
197	1580
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not sufficient to establish a trust. If the raising and education of the children had been required out of the rents and profits, the rule might be different.

4. *SAME—legacy as a charge—as a personal charge, and a charge upon the estate.* If a legacy is made a personal charge on the devisee, an acceptance of the devise imposes a personal liability on the devisee, who will take the estate devised as a purchaser and in fee; but if the legacy is charged on the estate devised, the devisee does not take as a purchaser, but as beneficial devisee.

WRIT OF ERROR to the Circuit Court of Monroe county; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. SLATE & WINKELMAN, for the plaintiffs in error:

Henrietta Reis took the devise of the rents, income and profits of the land in trust, and upon the condition to support and educate the testator's children. If this be so, she had no estate in the lands liable to sale for her debts. *Ditch v. Sennott*, 117 Ill. 367; *Anderson v. Crist*, 113 Ind. 65; *Reed v. Reed*, 30 id. 313; *Sibert v. Cox*, 100 id. 392.

Messrs. WILDERMAN & HAMILL, for the defendant in error:

It is well settled law, that a devise of the rents, incomes and profits of land is equivalent to a devise of the land itself. *Carpenter v. Van Olinder*, 127 Ill. 42; *Ryan v. Allen*, 120 id. 648; *Handberry v. Doolittle*, 38 id. 202; 2 Jarman on Wills, (Rand & Tal. ed.) 403; 3 id. 434.

The devise to Henrietta Reis was not charged with the raising, support and education of the testator's children, but the charge was upon the devisee, and was purely personal to her, and such being the case, she, upon acceptance, took under the will, as a purchaser. *Johnson v. Johnson*, 98 Ill. 564; *Funk v. Eggleston*, 92 id. 515; *Wright v. Denn*, 10 Wheat. 226; *Brill v. Wright*, 112 N. Y. 129; *King v. Denison*, 1 V. & B. 272; 2 Jarman on Wills, (Rand & Tal. ed.) 150.

Opinion of the Court.

Mr. JUSTICE CRAIG delivered the opinion of the Court:

This was an action of ejectment, brought by the defendant in error, to recover a part of a certain lot in the town of Waterloo, in Monroe county. The property originally belonged to Adam Reis, who died testate. The will of the testator, which was admitted to probate, contained the following provision:

"Second—I give and bequeath to my wife, Henrietta, the sum of \$1000, to be paid to her upon the final settlement of my estate. I also give and bequeath to her the houses and lots in said town in which I now reside, and which I purchased of Urban Stroh, for and during her natural life; also, all the rents, income and profits arising from all my real estate which I may own, (excepting said house and lots,) until the eldest one of my children has attained the age of eighteen years, upon condition that my said wife shall raise, support and educate my children until they respectively have attained the age of eighteen years, after which my wife shall receive one-third, only, of the net rents and income of such real estate, the other two-thirds to be paid to and equally divided among my children by my present wife."

Henrietta Reis (now Henrietta Ewald) accepted the provisions of the will, and in 1884 a judgment was rendered against her, upon which the property in question was sold, and upon the expiration of the time allowed for redemption, a deed was made to the defendant in error, upon which he recovered the possession of the property. It was admitted on the trial that the children named in the will are still residing with the said Henrietta; that the oldest one was then about fifteen years of age, and the youngest seven or eight. The lot involved was not the homestead, but a part of the property named in the second clause of the second provision of the will.

No irregularity is claimed in the rendition of judgment or in any of the proceedings under which the property was sold, but it is insisted by the plaintiffs in error that Henrietta Ewald

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did not acquire an interest in the land under the will which was subject to sale on judgment, and this is the only question presented by the record.

It will be observed that the testator did not, in words, devise to his wife, Henrietta, the lands involved, but the language used in the will is, "all the rents, income and profits arising from all my real estate, (excepting the homestead,) until the oldest one of my children has attained the age of eighteen years." Wills containing similar language have been before this court before, and the law may be regarded as well settled that a devise of the rents, income and profits of lands is equivalent to a devise of the land itself. *Handberry v. Doolittle*, 38 Ill. 202; *Ryan v. Allen*, 120 id. 648. See, also, 2 Jarman on Wills, 609, and cases there cited.

But it is also claimed, that under the terms of the devise Henrietta took in trust and held the property, not beneficially or as a purchaser, but as a trustee, and hence it could not be sold as her property. It will be observed, that by the language of the will the devise to Henrietta Reis was not charged with the support and education of the testator's children, but the charge was upon the devisee herself, and when such is the case the devisee takes as a purchaser. In *Funk v. Eggleston*, 92 Ill. 515, where a question of this character was under consideration, we there said: "We understand the rule to be, that if the legacies are made a personal charge on the devisee, an acceptance of the devise imposes a personal liability on the devisee, who will take the estate devised as a purchaser and in fee (unless a less estate is limited); but if the legacies are charged on the estate devised, the devisee does not take as a purchaser, but as a beneficial devisee." If the testator, in the devise of the property to his wife, Henrietta, had expressed a belief, wish or desire, request or hope, recommendation or entreaty, that the devisee would devote the gift to the benefit of his children, a trust might have been created, and the devisee might, had such language been used, become a trustee

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for the children. (Beach on Wills, sec. 215.) But no such language was used by the testator. He devised the property to his wife upon condition that she should support and educate his children, expressing no wish or desire whatever that the property devised should be devoted to such a purpose.

In *Bryan v. Howland*, 98 Ill. 625, it was held: "The mere expression of the motive for a gift or grant is not sufficient to establish a trust. Thus, a grant to A, to enable him to maintain his children, or an absolute gift to him, that he may support himself and children, will create no trust." In *Maline v. Keighley*, 2 Ves. Jr. 333, the Master of the Rolls said: "I will lay down the rule" (as to trusts to be implied from precatory words) "as broad as this: Whenever any person gives property and points out the object,—the property and the way in which it shall go,—that does create a trust." (See, also, *Mackett v. Mackett*, 2 Eng. Rep. by Moak, 412.) In *Hess v. Singler*, 114 Mass. 56, in considering what words in a will might be held sufficient to create a trust, the Supreme Court said: "In order to create a trust, it must appear that the words were intended by the testator to be imperative; and when property is given absolutely and without restriction, a trust is not to be lightly imposed upon mere words of recommendation and confidence."

In the clause of the will in question there will be found no language declaring a trust. It does not provide that the devisee shall raise, support and educate the children out of or from the rents and profits of the land, nor does it contain a provision that the devisee shall use the rents, incomes and profits of the land for such a purpose. So far as the language of the will is concerned, the devisee was at liberty to use the lands devised for any purpose whatever, as she might desire. Nor does the will contain any words expressing a wish, request, recommendation or desire that the lands devised should be used for the support and education of the children, from which a trust may be implied. We therefore see no ground

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upon which it can, in view of the authorities, be held that a trust was created.

We have, however, been cited to *Anderson v. Crist*, 113 Ind. 65, as an authority which may control the decision of the case. In that case one item in the will read as follows: "To my wife, Catharine Crist, I give the use of all my real estate, being about two hundred and fifty acres, where I now reside, in Adams township, Decatur county, Indiana, until my youngest child arrives at twenty-one years of age, for the purpose of rearing and educating my children. And when my youngest child arrives at age, then I desire that the said real estate shall pass to my said wife and my children—one-third to my wife, and the balance to my children or their descendants, as the law would cast it." The court held, under the language used, Mrs. Crist, having accepted the provisions of the will, became a trustee as to the rents and profits of the land, for the purpose stated. We find no fault whatever with the decision of the case cited, but the language used in that case is so different from the language in the will under consideration that the one can not be regarded as a precedent governing the other. In the Indiana case, as will be observed, the devise was made, as declared in the will, for the purpose of rearing and educating the children of the testator, while in the will in question no such purpose is declared or intimated by the testator,—and this is the distinguishing feature between the two cases.

We think the judgment of the circuit court was right, and it will be affirmed.

Judgment affirmed.

JOHN T. JOHNSON *et al.*

v.

MARY HUBER.

*Filed at Mt. Vernon November 5, 1890.*134 511
146 280

1. **PARTIES**—*on creditor's bill—to set aside fraudulent conveyance.* A having but a life estate, with two others, the owners of the remainder, conveyed the same, by warranty deed, for the purpose of defrauding their creditor. On bill by the creditor to set aside the deed, he failed to make the representatives of A, who had died, parties: *Held*, that the representatives of A, deceased, were necessary parties, by reason of the covenants of warranty in the deed.

2. **SAME**—*married woman—whether she may sue alone.* A married woman may maintain a creditor's bill in her own name, to set aside a conveyance by the debtor in fraud of her rights, although, if the complainant in such case be a *feme covert* residing with her husband in another State at the time of the filing of her bill, it would be advisable to join the husband as complainant.

3. **SAME**—*want of parties—how availed of.* By the rules of correct practice, an objection to a bill in chancery for want of proper parties should be taken by demurrer, plea or answer; but when the omitted party is not only a proper but also a necessary party, so that a final decree can not be rendered without affecting his or her interests, the objection may be taken at the hearing, or on appeal or error.

4. **BOND FOR COSTS**—*whether required.* After the entry of a decree in chancery favorably to the complainant, the defendants entered a motion to dismiss the suit for want of a bond for costs. It was not shown, by affidavit or otherwise, that at the time the suit was brought complainant was a non-resident: *Held*, no error to deny the motion.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of Madison county; the Hon. B. R. BURBOWHS, Judge, presiding.

This was a creditor's bill, filed by Mary Huber, in the circuit court of Madison county, against John T. Johnson, Fredericka Nolan and Thomas Nolan, to set aside a deed of conveyance made jointly by said John T. Johnson, Fredericka Nolan and Gesch W. Elsen, to the said Thomas Nolan; as being fraudu-

Brief for the Appellants.

lent against the complainant. At the March term, 1889, and after the entry of the decree, the defendants made a motion to dismiss the suit for want of a bond for costs. It was not shown, by affidavit or otherwise, that at the time the suit was brought complainant was a non-resident. The other material facts appear in the opinion.

Mr. W. S. FOREMAN, and Mr. A. W. HOPE, for the appellants :

The court erred in overruling the motion to dismiss the suit for want of a bond for costs. (Rev. Stat. chap. 33, secs. 1, 2, 3.) Under the statute of 1869 no discretion was allowed, but the motion was waived if not made within time for pleading in abatement. *Roberts v. Fahs*, 32 Ill. 474.

Under the act of 1874, the right to require security for costs is not waived, but may be insisted on at any stage of the case. It is jurisdictional. The non-residence was shown by the deposition. *Leadbeater v. Roth*, 25 Ill. 478.

The court erred in holding that Mrs. Huber might maintain the bill in her own name, she having a husband, with whom she resided, in the State of Missouri, where it will be presumed the common law is in force. *Tinkler v. Cox*, 68 Ill. 119.

The rule of law, that the personal capacity or incapacity attached to a party by the law of the place of his or her domicile, is deemed to exist in every other country, so long as the domicile remains unchanged, even though the transaction would be obligatory under the law of the foreign country. Story on Conflict of Laws, (Redfield's ed.) secs. 65, 423, p. 70; *Duboise v. Jackson*, 49 Ill. 52.

The judgment debtor is an indispensable party to a creditor's bill. *Spear v. Campbell*, 4 Scam. 424; *Thomas v. Adams*, 30 Ill. 37; *Alexander v. Hoffman*, 70 id. 116; *Craig v. Smith*, 94 id. 474.

The administrator of the deceased debtor was a necessary party. *Spear v. Campbell*, 4 Scam. 424; *McDowell v. Cochran*, 11 Ill. 31.

Brief for the Appellee. Opinion of the Court.

Mr. JOHN J. BRENHOLT, and Mr. R. S. SAWYER, for the appellee :

There was no proof that complainant was a non-resident when the suit was commenced. *Leadbeater v. Roth*, 25 Ill. 587 ; *Lee v. Waller*, 13 Bradw. 403.

The *lex fori* is the law of the remedy, and complainant's right to sue in her own name, for the protection of her interests or property, is given by the statute. Rev. Stat. chap. 68, sec. 1.

It was also unnecessary, we think, to make Gesch W. Elsen, or her administrator, a party to this suit, because the appellee was only seeking to subject Johnson's and Fredericka Nolan's interest in the real estate mentioned in the bill, to the satisfaction of appellee's judgment ; and under our statute, where there are two or more judgment debtors, the judgment creditor can make his money out of the property of one of them, if he so desires.

Mr. JUSTICE WILKIN delivered the opinion of the Court :

As amended, this was a bill by appellee, as a judgment creditor of appellants Johnson and Fredericka Nolan, and one Gesch W. Elsen, to set aside an alleged fraudulent conveyance of certain lots in the city of Alton, to appellant Thomas Nolan. The bill alleges the recovery of a judgment against said John T. Johnson, Fredericka Nolan and Gesch W. Elsen, at the October term, 1886, of the circuit court of Madison county ; also, that on August 16, 1886, after contracting the indebtedness on which said judgment was rendered, they jointly conveyed the said lots to said Thomas Nolan, who, with said Fredericka, his wife, executed and delivered, at the same time, a mortgage on said premises, to secure the payment of a promissory note for \$1000, payable to said John T. Johnson,—which mortgage and deed were each executed with intent to hinder and delay complainant and other creditors of the said

Opinion of the Court.

Gesch W. Elsen, John T. Johnson and Fredericka Nolan; that said Gesch W. Elsen owned but a life estate in the conveyed premises, and that said Johnson and Fredericka Nolan were the owners thereof in fee, subject to said life estate; that said Gesch W. Elsen died in July, 1887. The original bill was filed September 14, 1887.

The defendants, by their joint answer, admitted the recovery of a judgment against John T. Johnson and Fredericka Nolan by appellee, but say nothing as to Gesch W. Elsen being a party thereto. They admit the execution of the deed and mortgage, as alleged in the bill, but deny that they were fraudulent, or intended to delay complainant or other creditors of the grantors, and aver that they were each made in good faith, for a valuable consideration.

A decree was rendered setting aside the deed and mortgage, and subjecting the interests of said Johnson and Fredericka Nolan in said lots to the payment of said judgment. On appeal to the Appellate Court for the Fourth District that decree was affirmed, and appellants now bring the record to this court.

One ground of reversal insisted upon is, that the representatives of Gesch W. Elsen, one of the judgment debtors, and also one of the grantors in the alleged fraudulent conveyance, were necessary parties to the bill. We think the point is well taken. While the bill shows that the said Elsen had but a life estate in the lots conveyed, and upon her death Johnson and Fredericka Nolan would have become the absolute owners thereof, and therefore the decree prayed for would affect no interest of hers in the property, it also shows that she was a joint grantor in the deed sought to be vacated. That deed, as appears from the evidence, was a deed with covenants of title, by which the grantors, John T. Johnson, Gesch W. Elsen and Fredericka Nolan, jointly conveyed to Thomas Nolan the lots in question. It was expressly held by this court in *Spear v. Campbell et al.* 4 Scam. 426, that in a bill like this the judgment debtor, and grantor in the alleged fraudulent

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conveyance, was a necessary party, and it was there said: "The payment of judgments recovered against him was sought to be enforced out of property which he had conveyed with covenants of title, apparently for a valuable consideration, and without fraud or collusion. He ought, under such circumstances, to have an opportunity of showing that the judgment had been paid or otherwise discharged. He should be permitted to contest the right of the complainants to the peculiar remedy they were pursuing. He might be interested in sustaining the conveyance which he made, and he certainly should be allowed the privilege of insisting and proving that it was made in good faith, for a valuable consideration, and without any design to defraud the complainants, or hinder or delay them in the collection of their debts. A decree invalidating his conveyance might result in an eviction of his grantee, who would turn upon him, and seek to make him liable for the failure of title."

This doctrine has never been overruled or modified. Under it, *Gesch W. Elsen*, if living, would unquestionably be a necessary party, not because any interest she had in the land could be taken to pay said judgment, but because, by reason of the covenants in her deed, she would be interested in sustaining the conveyance. For the same reason her representatives are necessary parties. The fact that both parties to the deed may have known that she had but a life estate in the premises conveyed, would not affect *Nolan's* right to recover on her covenants of title, if he should be ousted under this decree. *Morgan v. Smith*, 11 Ill. 194; *Beach v. Miller*, 51 id. 206.

It is true, that by the rules of correct practice the objection to the bill for want of proper parties should have been raised by demurrer, plea or answer; but where the omitted party is not only a proper but a necessary one, so that a final decree can not be rendered without affecting his or her interests, the objection may be taken at the hearing, or on appeal or writ of error. 1 *Daniell's Ch. Pl. and Pr.* p. 285, note 2; *Spear*

Syllabus.

v. *Campbell et al. supra*; *Farmers' Nat. Bank v. Sperling*, 113 Ill. 281.

We think the Appellate Court was clearly right in holding that the circuit court committed no error in overruling the motion to dismiss the bill for want of a cost bond. Also, in holding that complainant could maintain the bill in her own name, although, if she was a *feme covert* residing with her husband in another State at the time she filed her bill, it would be advisable to join her husband as complainant.

As the decree below must be reversed for want of proper parties defendant, no good purpose would be subserved by expressing an opinion as to other objections made to the proceedings in the circuit court, especially since they may be avoided on another hearing.

The judgment of the Appellate Court will be reversed, and the cause remanded to the circuit court of Madison county.

Judgment reversed.

184 516
180 456

JAMES W. CAVANAUGH

v.

WILLIAM McCONOCHIE.

Filed at Ottawa October 31, 1890.

CONTESTED ELECTION—*return term of the summons.* The statute giving a remedy for the contest of an election, declares: "Summons shall issue against the person whose office is contested, and he may be served with process or notified to appear in the same manner as is provided in cases in chancery." The ninth section of the act relating to practice in chancery provides: "Every summons in chancery shall be made returnable to the next term of the court after the date thereof, or the next succeeding term thereafter." So a summons issued out of the county court, in a proceeding to contest an election, made returnable to a term of the court beyond the second term after the teste of the writ, is void.

Opinion of the Court.

APPEAL from the County Court of Rock Island county; the Hon. LUCIAN ADAMS, Judge, presiding.

Mr. WILLIAM McEWING, and Mr. IRA O. WILKINSON, for the appellant.

MESSRS. SWEENEY & WALKER, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

At the municipal election held on April 2, 1889, William McConochie and Fr  derick Hass were rival candidates for the office of mayor of the city of Rock Island, and on the 5th of that month the returns were duly canvassed, and McConochie, the appellee, declared elected. James W. Cavanaugh, the appellant, a citizen and elector of said city, filed, on the 4th day of May following, with the clerk of the county court of Rock Island county, a petition or statement, in writing, for the purpose of contesting the election of appellee, which petition was entitled of the July term, 1889. The statute provides for three law terms in each year of the county court of said county, beginning on the second Mondays of March, July and November, respectively, (Rev. Stat. 1874, chap. 37, secs. 72, 153,) and for probate terms, commencing on the first Monday of each month in the year. (Laws 1887, p. 162.) On the day the petition was filed, (May 4, 1889,) a summons was issued, returnable "on the second Monday of July next,"—1889. Appellee, on the 8th day of July, 1889, that being the first day of the July law term of said court, limiting his appearance to those purposes only, entered his motions to quash the summons and to dismiss the suit, and thereafter, on the 23d day of that month, the court sustained both of said motions and entered an order quashing said summons, and also an order dismissing the suit, and rendered judgment against appellant for costs, and awarded execution therefor.

The first contention urged by appellant upon this his appeal from the order and judgment of the county court is, that as

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the county court is a court of record, section 1 of the Practice act (Rev. Stat. chap. 110, sec. 1) is applicable, and that it provides, in terms, that "the plaintiff may, in any case, have summons made returnable at any term of the court which may be held within three months after the dates thereof," and that as the summons in question was issued and bore date on May 4, 1889, and was returnable to the term of the court commencing July 8, 1889, a time within three months next after such date, it was valid process. We can not concur in this view. In *Dale v. Irwin*, 78 Ill. 170, and *Talkington v. Turner*, 71 id. 234, it was held that a statutory proceeding to contest an election such as that here involved, whether presented in the circuit or in the county court, is, to all intents and purposes, a chancery proceeding, and subject to all the rules governing such a suit. (See, also, *Kingery v. Berry*, 94 Ill. 515.) It has also been decided that the Practice act relates to law cases alone, except in certain provisions where other classes of cases are specifically referred to. (*Moore v. Tierney*, 100 Ill. 207; *Fergus et al. v. Garden City Manf. Co.* 71 id. 51.) Even if the county court be a court of law, and is not invested with general chancery jurisdiction, yet no reason is perceived why the legislature may not confer upon it, by general law, jurisdiction over a particular subject matter of chancery jurisdiction, or jurisdiction in respect to a statutory proceeding in the nature of a chancery proceeding.

But it is urged, the court being a court of law, and this case one in which legal rights are to be determined and legal remedies applied, the Practice act governs it. Even were the premises conceded, the conclusion does not follow. This is a statutory proceeding, provided for by the act in regard to elections, and the statute which gives the remedy expressly enacts that "summons shall issue against the person whose office is contested, and he may be served with process or notified to appear in the same manner as is provided in cases in chancery." (Rev. Stat. chap. 46, sec. 114.) This language

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clearly indicates the legislative intention to be, that summons shall issue against the defendant in the same manner as is provided in cases in chancery. How issue in the same manner as in chancery cases? By turning to the ninth section of the act to regulate the practice in courts of chancery, we find it says, "that every summons in chancery shall be made returnable to the next term of the court after the date thereof, or the next succeeding term thereafter." Manifestly, the rule thus prescribed is very different from that which is laid down in section 1 of the act in regard to practice in courts of record, and a portion of the language of which we have heretofore quoted herein. So, should we assume the correctness of the premises stated by appellant, yet it follows that this statutory proceeding is not in all respects governed by the provisions of what is commonly known as the Practice act, since it can not be denied that the legislature may give a remedy by a particular statute, and direct a mode of procedure therein different from that prescribed by the general law, and that to the extent said law is different from the particular act the latter must control.

In *Kreitz v. Behrensmeyer*, 125 Ill. 141, this court construed sections 5 and 7 of the County Court act, (Rev. Stat. 1874, chap. 37, p. 339,) and held that the jurisdiction given by the act, in regard to elections, to the county court, to hear and determine contests of election, was a jurisdiction which fell, under the provisions of said sections, in the category of matters which were to be considered as probate matters, and cognizable at the probate terms of the court, and it was decided that the summons which had been issued in that case was properly made returnable to a probate term instead of to a law term. The now contention of appellant in that behalf, as we understand it, is, that as section 6 of the County Court act, as amended in 1887, (see Rev. Stat. 1874, p. 340, and Laws 1887, p. 162,) provides that "all matters cognizable at such probate terms shall also be cognizable at the law terms

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of such court," the proceeding, even if it be considered "as a probate matter," is legally cognizable at a law term of the court, and a summons returnable to a law term is a valid process. Appellant's position, as near as we can formulate it, is, that this provision means, that where process has been issued upon a probate matter and returnable to a probate term, and there is due service, so that the court has acquired, at a probate term, jurisdiction of both the subject matter and of the parties, then such probate matter is also cognizable at the law terms of the court, but that the acquirement of such jurisdiction at an antecedent probate term is a condition precedent to the matter being cognizable at a law term, and that therefore a summons in such proceeding returnable to a law term is void.

In the view we take of the case, a determination of the issue thus raised is wholly unnecessary, if not immaterial. A petition, such as this, to contest an election, is primarily within the jurisdiction of the county court at its probate terms, and a summons in such a proceeding is properly returnable to a probate term. There is no jurisdiction of the petition at the law terms, except that given by virtue of its being cognizable at the probate terms. If the position taken by appellee is well taken, then it requires no argument to show that the court below held properly in ruling the summons to the law term was void, and should be quashed. If, on the other hand, the summons may, as appellant claims, be made returnable indifferently to a probate or a law term, it follows, necessarily, under the facts of this case, that the same result must be reached.

Cases which are by the statute expressly and primarily made cognizable at the law terms, are cognizable exclusively at such terms, and process, in such cases, must be made returnable at the law terms. (See secs. 7 and 112 of the County Court act.) But it can not be affirmed of matters primarily cognizable at probate terms that they are cognizable exclu-

Opinion of the Court.

sively at said terms, since the statute provides that all matters cognizable at probate terms shall also be cognizable at law terms; and if we assume the correctness of the claim of appellant, then a summons in a proceeding in respect to any of such probate matters is returnable, indifferently, either to a probate or a law term, in which event all terms of the county court, whether law or probate, are terms of the county court, in the eyes of the law, so far as such proceeding is concerned.

We have already seen that the first section of the act in regard to practice in courts of record does not govern in the matter of the summons issued upon the filing of a petition to contest an election, but that such summons is controlled by the provisions of the act to regulate the practice in courts of chancery, and that the mandate of the ninth section thereof is, that every such summons shall be made returnable to the next term of the court after the date thereof, or the next succeeding term thereafter. The summons in this case was dated and issued on the 4th day of May, 1889. The next term of the court after that date began on Monday, May 6, 1889, and the next succeeding term thereafter commenced on Monday, June 3, 1889. The requirement of the statute was, that this summons should have been made returnable on one or the other of the dates last mentioned. Instead of its being made so returnable, it was made returnable on the second Monday of July following, at the law term then to be held; and assuming, for the purposes of the present case, that a summons in a proceeding like this might, under proper circumstances, have been made returnable to said law term, yet we find that here not only were the May and June terms of the county court passed over, in defiance of the statute, but that a third term of the court (the July probate term) intervened between the teste and the return day of the writ. That a summons thus issued is void, and confers no jurisdiction, has been frequently decided. *Hochlander v. Hochlander*, 73 Ill. 618, and cases there cited.

Syllabus.

It follows from what we have said, that there was no error in the order of the court below sustaining the motion to quash the summons.

The other contention relied upon by appellant is, that the county court erred in entering the order dismissing the suit at his costs. Appellant made no application to the court to retain the petition and issue another summons thereon. If he desired to further prosecute his suit, he should have entered a motion in that behalf, and thereby afforded the court an opportunity to either allow or deny that which probably was desired. It is not the practice of the courts to give to their suitors that which they do not ask. Had appellant made an application such as is above indicated, then, in the event his motion was denied and his suit dismissed, he would have been in a position, a proper exception being taken, to assign error upon the rulings of the court. But here, the writ having been properly quashed, on the ground it was absolutely void, and no other writ being solicited, there was no good object to be accomplished by longer retaining the petition, and there was no error in dismissing it out of the court and taxing plaintiff therein with costs.

We find no error in the record, and the orders and judgment of the county court are affirmed.

Judgment affirmed.

ELIZABETH WHEELER *et al.*

v.

ELIZABETH WHEELER, *Exrx.* *et al.*

Filed at Ottawa October 31, 1890.

1. CONTEST OF WILLS—*limitation as to time of filing the bill—jurisdictional.* The power of a court of equity to set aside the probate of a will is purely statutory, and the jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. The

134	522
173	130
134	522
75a	156
134	522
178	104
134	522
180	372

134	522
123	40

Brief for the Appellants.

time limited for the filing of a bill to contest a will is jurisdictional, and if the jurisdictional facts are not alleged, a demurrer will lie.

2. *SAME—saving clause—as to time of filing bill—in respect of “persons absent from the State”—the statute construed.* The saving clause in section 7 of the Statute of Wills, relating to the limitation of the time for contesting wills by bill in chancery, in favor of infants, *femes covert* and persons insane, applies equally to such persons, whether residents or non-residents of this State; but the provision “saving to persons absent from the State,” applies to those only who are subject to the jurisdiction of the State, and have gone out of that jurisdiction for temporary purposes. It does not apply to persons who have never been residents of the State.

3. *SAME—former decision.* The decision in *White v. Hight*, 1 Scam. 204, extending the saving clause to non-residents, is no longer the rule in this State.

4. *CONSTRUCTION OF STATUTES—how far controlled by State policy.* While the policy of the State indicated by a series of legislation is not of controlling weight in the construction of statutes, it is a matter that may be properly considered in determining the legislative intention in employing words susceptible of two meanings. Other things being equal, that construction will be adopted which comports with such State policy.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. OLIVER H. HORTON, Judge, presiding.

Mr. MASON B. LOOMIS, for the appellants:

A saving in a statute in favor of persons absent from the State applies as well to non-residents as to residents. *White v. Hight*, 1 Scam. 204; *Paine v. Drew*, 44 N. H. 317; *Hall v. Little*, 14 Mass. 203; *Dwight v. Clark*, 7 id. 514; *Wilson v. Appleton*, 17 id. 180; *Von Hemert v. Porter*, 11 Metc. 210; *Burger v. Roche*, 11 Pick. 36; *Strithorst v. Græme*, 3 Wils. 145; *Lebeux v. Berkeley*, 5 A. & E. 836; *Williams v. Jones*, 13 East, 439; *Lafonde v. Ruddock*, 24 E. L. & E. 239; *Duplien v. De Roven*, 2 Vt. 450.

The words “absent from the State,” in a statute, are not confined in their application to those who have once been inhabitants, but are equally applicable to those who have never

 Brief for the Appellees.

before been in the State,—to foreigners as well as citizens. It has been so decided in this State in the case of *White v. Hight*, *supra*. It has been so decided in Massachusetts, not only in the cases hereinbefore cited, but also in *Whitney v. Goddard*, 20 Pick. 310; *Brigham v. Biglow*, 12 Metc. 270; *Putnam v. Dyke*, 13 Gray, 538. Also in New York, in *Ruggles v. Keeler*, 3 Johns. 263; *Cole v. Jessup*, 2 Barb. 309; *Carpenter v. Wells*, 21 id. 593; *Fowler v. Hunt*, 10 Johns. 465; *Ford v. Babcock*, 2 Sandf. 518. So in Vermont, in *Dunning v. Chamberlain*, 6 Vt. 127; *Russ v. Fay*, 12 id. 240; *Graves v. Weeks*, 19 id. 178; *Hall v. Railroad Co.* 28 id. 401; *Davis v. Marshall*, 37 id. 69. And in Connecticut, in *Hatch v. Spofford*, 24 Conn. 432. And in Maine, in *McMillan v. Wood*, 29 Me. 217, and *Tribodeau v. Levasseur*, 36 id. 362. And in New Hampshire, in *Sissons v. Bicknell*, 6 N. H. 557; *Paine v. Drew*, 44 id. 306; *Howard v. Fletcher*, 59 id. 151. And in Rhode Island, in *Crocker v. Arey*, 3 R. I. 178. And in Missouri, in *King v. Lane*, 7 Mo. 241; *Sheve v. Whittlesy*, id. 473; *Bedford v. Bradford*, 8 id. 233. And in Ohio, in *North v. Wilson*, Wright, 152. And in Indiana, in *Wood v. Bissell*, 108 Ind. 229. And in Minnesota, in *Jordan v. Secombe*, 33 Minn. 220. And in Alabama, in *State Bank v. Seawell*, 18 Ala. 616, and *Thompson v. Odum*, 23 id. 480. And in Arkansas, in *Wakefield v. Smart*, 3 Eng. 488, and *Field v. Dickinson*, 3 Pike, 409. And in Nevada, in *Robinson v. Mining Co.* 5 Nev. 44. See, also, Angell on Limitations, secs. 204, 206, and notes.

Mr. M. J. DUNNE, for the appellees :

The words "absent from the State," in the statute, do not apply to one never in the State. *Snoddy v. Cop*, 5 Tex. 106; *Beardsly v. Southmayd*, 3 Green, 171; *Baber v. Brentwall*, 3 Harr. 262; *Hale v. Lawrence*, 1 Zab. 714.

The saving or exception which takes the case from the operation of the statute must be clear, and nothing will be implied in favor of exemption. *Weller v. Child*, 12 Allen, (Mass.) 333;

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Bucklin v. Ford, 5 Barb. 393; *Warfield v. Fox*, 53 Pa. 382; *Favorite v. Booker*, 17 Ohio St. 548; *Dozier v. Ellis*, 28 Miss. 730.

Mr. JUSTICE SHOPE delivered the opinion of the Court:

This is a bill in chancery, filed by appellants, under the seventh section of the Statute of Wills, (Rev. Stat. chap. 148,) to set aside the will of Thomas Wheeler, deceased, on the ground of mental incapacity of the decedent to make a will, and of the undue influence exercised upon him in procuring its execution. The bill was filed October 24, 1888, and the will was duly admitted to probate, as alleged in the bill, October 13, 1873, substantially fifteen years prior to the filing of the bill. The bill alleges that the complainants, and each of them, were, at the time of the death of said Wheeler, and ever since have been, non-residents of the State of Illinois, and have never resided in this State; that two of them have resided in Ireland and one in the State of Massachusetts, and that until immediately prior to the filing of their bill, they, nor either of them, had any knowledge that said decedent had made a will, or of the probate of an instrument purporting to be his will. A demurrer was filed to the bill, and sustained. The only question presented by the record is, whether the complainants, by their bill, bring themselves within the saving clause of the statute.

It is the established doctrine, that, independently of statutes authorizing it, courts of equity have not, under their general chancery powers, jurisdiction to entertain a bill to set aside a will or the probate thereof. (*Gaines v. Feuntes*, 92 U. S. 10; 2 Pomeroy's Eq. 913; *Gould v. Gould*, 3 Story, 546; *Holden v. Meadows*, 31 Wis. 284; *Webb v. Cleverden*, 2 Atk. 424.) We therefore held in *Luther v. Luther*, 122 Ill. 558, that as the jurisdiction of courts of equity, in this State, to entertain bills to set aside the probate of wills, is derived exclusively from the statute, such jurisdiction can only be exercised in the mode

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and under the limitations therein prescribed, and that the time limited within which bills for that purpose might be brought was jurisdictional, and the bill must be exhibited within the period thus limited, or the court is without power to entertain the same. It follows that the allegations of the bill must be such as will warrant the court in proceeding, and if the jurisdictional facts are not alleged, a demurrer will properly be sustained.

The section of the statute under consideration, after providing for the proceedings upon the probate of the will, further provides: "That if any person interested shall, within three years after the probate of any such will, testament or codicil, * * * appear, and by his or her bill in chancery contest the validity of the same, an issue at law shall be made up whether the writing produced be the will of the testator or testatrix or not; * * * but if no such person shall appear within the time aforesaid, the probate as aforesaid shall be forever binding and conclusive on all the parties concerned, saving to infants, *femes covert*, *persons absent from the State or non compos mentis*, the like period after the removal of their respective disabilities," etc. As applicable here, the saving is "to persons absent from the State," and the question presented is, are the complainants "persons absent from the State," within the meaning of this statute.

We are aware that in England and in many of the States similar provisions in limitation laws have been construed to save the right of action to non-residents as well as to residents absent from the jurisdiction. Thus, in *Von Hemert v. Porter*, 11 Metc. 210, it was held, that where the saving was "to persons absent from the United States," it was applicable to foreigners who were never within the United States. So in *Hall v. Little*, 14 Mass. 203, and *Putnam v. Dyke*, 13 Gray, 538. In *Payne v. Drew*, 44 N. H. 306, the words "absent from," in the saving to the statute, is held to include all non-residents; and it was there said, that in the various States

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where the question has been presented, except the States of New Jersey and Texas, a like construction has been adopted. At a very early day the courts of England, in the construction of the limitation acts, held the same rule. The concurrence of decision by courts of such eminent respectability ordinarily would be controlling, and be followed in construction of similar statutes, but we do not feel bound thereby in the decision of this cause.

This court, in *White v. Hight*, 1 Scam. 204, gave similar construction to the saving clause contained in the seventh section of the act of February 10, 1827, (Laws of 1827, p. 248,) which saved the right to bring suit, etc., to persons under the age of twenty-one years, insane, *feme covert*, or "beyond the limits of this State," provided said suit, etc., was brought within the period fixed by the act, after becoming of full age, sane, *feme sole*, or "coming within this State." The limitation having been pleaded, it was held that a replication that the plaintiff, when the cause of action accrued, was and ever since has been beyond the limits of the State, to-wit, in the State of Ohio, was a good answer to the plea, and it was there held that the saving clause included non-residents of the State as well as residents who might be temporarily without its limits. At the next session of the legislature after the promulgation of this decision, the legislature amended the act of 1827 so as to exclude non-residents from the operation of the saving clause, unless they were infants, insane or *feme covert*, and confining the saving, as to such persons, only until the disability of insanity, infancy or coverture should cease.

It is manifest that the construction contended for by appellees, if adopted, would have the effect of extending rights to foreigners and non-residents of the State that have not been conferred upon our own citizens. The most that could be rightfully claimed, under the constitution or as a matter of comity, would be that citizens of a sister State should be placed upon a footing with citizens of this State, and accorded equal

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rights and immunities under our law, and we can not suppose that it was intended to give greater protection to non-residents than to residents of the State,—and the act should not be so construed unless we are compelled by the language of the legislature to attribute to them such an intention. This State has extended to non-residents the most liberal protection under its limitation laws. If the cause of action be barred by the laws of the State where it accrued, a plea of such foreign statute will be held good to bar recovery within this State. And so in respect of the enforcement, under our laws, of claims accruing elsewhere. If they are not barred by the law of the place where they accrued, or the domicile of the parties, they will not be barred under our law until the running of the statute within this State.

It will, however, be unnecessary to notice in detail the various acts bearing upon the general subject of the limitation of actions, but it may be said that since the passage of the act of 1837, before mentioned, now over a half century, through all the changes in the limitation laws and other acts affecting the assertion of private rights within this State, the legislative department of the government has uniformly adhered to the principles promulgated by that act. No act of the legislature has been called to our attention where a different policy has been indicated, or where, by any fair inference, it can be argued that non-residents are accorded privileges or exceptions not enjoyed by citizens of this State, unless it be the act in question.

In the eighth section of the Limitation statute, (chap. 83,) taken from the act of 1839, copied into the act of 1845, and literally therefrom in the revision of 1874, the saving is to those “out of the limits of the United States and in the employment of the United States or of this State.” Section 9 of the same act saves rights to persons “absent from the United States in the service of the United States or of this State.” By these sections a distinction between non-residents and per-

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sons "out of" or "absent from" the State is clearly drawn, and it would seem clear that an intention was manifested not to follow the rule announced in *White v. Hight*, and other cases alluded to, but to exclude from the saving clause of the statute all persons who were not residents or not absent in the particular employment designated. So with the limitation of personal actions the saving is simply to minors, persons insane or in prison, and, formerly, to *femes covert*. So, again, in the Administration act, the saving is to *femes covert*, infants, persons of unsound mind, or imprisoned, or "without the United States in the employment of the United States or of this State." Other illustrations of the legislative policy might be given, such as the statute allowing the opening of decrees, etc., which have been rendered upon constructive notice, and many others; but sufficient has been shown to clearly indicate the policy of the State in this regard.

Again, the legislature, in a very marked manner, has established a policy to facilitate the speedy settlement of estates and the prompt distribution of funds to creditors and distributees. This has been repeatedly recognized by this court. Moreover, public policy demands that such construction to the law should be given, if practicable, and such rules of procedure established, as will most nearly effect a realization of the full value of the estate of decedents. In this respect the legislative policy is again strikingly manifest in the many provisions of law giving the court supervision of sales, requiring publication and notice, permitting sales on credit, requiring valuation, and like provisions.

Without pausing to discuss the effect of the rule contended for, it is clear, that while the purchaser at executors' sales or from devisees might be willing to purchase at the expiration of three years or before, if there was a reasonable certainty as to who might contest the will, yet if, after an indefinite period, bills of this character might be filed, no one would feel at liberty to purchase at the value of the premises, and no

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one could safely buy property the title to which depended upon the validity of a will, where there might be non-resident heirs, except at such diminished price as would enable him to bear the contingency of losing the land, or engaging in expensive litigation to maintain his title.

It is conceded that the policy thus indicated is not controlling, but is a matter proper to be considered in determining the legislative intention in employing the language of this section. It is familiar that if the words employed are susceptible of two meanings, that will be adopted which comports with the general public policy of the State as manifested by its legislation, rather than that which runs counter to such policy. The question at last to be determined is, what was the legislative intent? That must be gathered from the words used, and, ordinarily, where technical words are not employed, the language must be construed according to its popular acceptance. *Stuart v. Hamilton*, 66 Ill. 253; *Richmond v. Moore*, 107 id. 429; *Steere v. Brownell*, 124 id. 27.

The act provides, that if no one shall appear within the time limited, the probate of the will shall be forever binding and conclusive on all parties concerned and not falling within the saving clause. These provisions are correctly designated "statutes of repose," and are dictated by a wise public policy,—to put at rest title to property and prevent stale and vexatious litigation; and, being promotive of the public welfare, exceptions out of or savings from such statutes are to be strictly construed. The word "absent," when used as an adjective, is defined by Worcester literally as "not present." The first definition given by Webster is, "withdrawn from or not present in a place;" and by Anderson, (Dictionary of Law,) "being away; not present; not at one's domicile or usual place of business." The verb "absents" necessarily means to withdraw from or go away from a place.

It must be conceded that the definition as given by Worcester would seem to indicate that the word "absent," used as a

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descriptive adjective, included all persons, whether resident or non-resident. The other standards quoted from, in their definition of the word, convey the idea that there is a withdrawing from, or that the party mentioned is not at the place where he might be expected to be,—and this is the sense in which the words “absent from Ireland” were construed by Lord ELLENBOROUGH, in *Buchanan v. Rucker*, 9 East, 194. The judgment there was attempted to be maintained on the ground that it was authorized by local laws of the island of Tobago, where rendered, in cases of “persons absent from the island,” and it was said: “By ‘persons absent from the island,’ must necessarily be understood persons who have been present within the jurisdiction, so as to be subject to the process of the court; but it can never be applied to a person who, for aught that appears, never was present within or subject to the jurisdiction. ‘Absent from the island’ must be taken only to apply to persons who have been present there, and were subject to the jurisdiction of the court out of which the process issued.” The same construction was given in *Stoney v. Cage*, 5 Texas, 106. It is true that the act there provided that the action might be brought “after his or their return,” etc.; but the court holds that a correct definition of the word “absence” requires its application to those who had been within the jurisdiction of the court, and not to persons who had never been within the limits of the State. The definition of the adjective as given by Webster expresses our understanding of its common use and acceptance, and may properly be held to be the sense in which it is employed in the section quoted. It is true that this provision, without the alteration as it was passed in 1829, was carried into the revisions of 1833, 1845 and 1874; but, as we have seen, the whole spirit of legislation of the State in respect of the limitation of actions forbids the supposition that the legislature deliberately designed to keep open litigation, in respect of the property within the State, for an indefinite period, for the benefit of those residing without its

Syllabus.

limits who are not subject to its laws and contributing nothing to the maintenance of its government, while denying the same right to its own citizens.

As we have seen, where two constructions can be given with equal facility, that must be adopted which comports with the public policy of the State; and while we recognize the rule as laid down elsewhere by the distinguished tribunals to which we have referred, we feel constrained, in view of the legislation of the State and the uniform construction thereto given by courts of the State, to adopt a contrary view, and to hold that the provision of the statute applies only to those who are residents of the State and absent therefrom. As a matter of course, the saving to infants, *femes covert* and persons insane, is general, and applies equally to those within and without the State; but the provision, "saving to persons absent from the State," must be construed as meaning those who are subject to its jurisdiction, but who have departed or gone without that jurisdiction for temporary purposes.

We are of opinion that the demurrer was properly sustained, and the judgment of the Appellate Court will be affirmed.

Judgment affirmed.

ANN STILLMAN

v.

RAYMOND PALIS.

Filed at Mt. Vernon November 5, 1890.

184	532
44a	81
44a	118
45a	495

184	522
218	1384
218	1386
118a	1478

1. FORCIBLE ENTRY AND DETAINER—*a possessory action only*—title not involved. The title to land can not be determined in the statutory proceeding of forcible entry and detainer.

2. So in such action it is not improper for the court, by instruction, to tell the jury that the title to the property is not involved, and that the material question for their determination is the right to the possession.

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3. *SAME—demand before suit.* Where a party makes an illegal and forcible entry upon land in the possession of another, no notice or demand for possession by the latter, before bringing forcible entry and detainer, is necessary.

4. *SAME—description of the premises.* The description of land in a complaint in an action of forcible entry and detainer, from which the land is susceptible of being easily and definitely located by a surveyor, is sufficiently definite and certain.

5. *SAME—motion to dismiss—too late after trial commenced.* A motion in a forcible entry and detainer suit to quash the complaint and dismiss the cause, for the reason that the description of the premises is insufficient and uncertain, and for want of a demand, comes too late after the jury is impaneled and sworn and the trial commenced.

APPEAL from the Appellate Court for the Fourth District;—heard in that court on appeal from the Circuit Court of St. Clair county; the Hon. B. H. CANBY, Judge of the City Court of East St. Louis, presiding.

Mr. WILLIAM P. LAUNTZ, for the appellant:

The description of the land is not sufficient to give jurisdiction. *Schaumtöffel v. Belm*, 77 Ill. 567; *Hughes v. Streeter*, 24 id. 648; *Thompson v. Sornberger*, 59 id. 326; *Mann v. Brady*, 67 id. 95; *Schackelford v. Bailey*, 35 id. 387.

There was an abandonment of possession. *Hassett v. Johnson*, 48 Ill. 68; *DeGraw v. Pryor*, 60 Mo. 56.

The legal title draws to it the legal possession of the land. *Hassett v. Johnson*, 48 Ill. 68.

Mr. M. W. SCHAEFFER, and Mr. J. N. PERRIN, for the appellee:

No notice or demand was necessary before suit, for the reason the entry was forcible. An entry is forcible that is made against the will of the occupant. *Reeder v. Purdy*, 41 Ill. 279; *Smith v. Hoag*, 45 id. 250.

Mr. JUSTICE BAKER delivered the opinion of the Court:

This was an action of forcible entry and detainer, prosecuted by appellee, against appellant. It seems that the parties are the proprietors of adjoining tracts of land, and that there

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is a controversy between them in respect to their boundary line and the ownership of a narrow strip of ground. The question of the title to this strip can not be determined in this statutory action, (*Kepley v. Luke*, 106 Ill. 395,) and all matters of controverted fact are conclusively settled by the verdict and judgment in the trial court, and judgment of affirmance in the Appellate Court.

The facts of the case, as found by the courts below, so far as is necessary for the purposes of our decision, sufficiently appear in the special findings of the jury at the trial. They were, that appellee cultivated the premises in dispute during the year 1882, and husbanded the crops raised thereon that year; that he was in possession of said premises on the 15th day of March, 1883, and immediately prior thereto, and that appellant, on said 15th day of March, took forcible possession from appellee, of said premises.

It is urged it was error to strike from the files the motion interposed by appellant to quash the complaint and dismiss the cause, for the reasons the description of the premises was insufficient and uncertain, and no demand was made or notice given before suit brought. The action of the court was justified by the fact that the motion was not presented until after the jury was impaneled and sworn and the trial commenced. But, waiving this, the action of the court may be regarded as, in substance, a denial of the motion. The motion was not well grounded. The entry of appellant was charged in the complaint to have been illegal and forcible, and such being the case, no notice and no demand for possession, before the bringing of suit, was necessary. (See secs. 1 and 2 of Forcible Entry and Detainer act.) The description of the land in dispute that is contained in the amended complaint, seems to us, and is shown by the testimony of the surveyor, to be susceptible of being easily and definitely located. The error in regard to the motion is not well assigned.

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The instructions given at the instance of appellee were not erroneous. It was not improper to tell the jury that the title to the property was not involved, and that the material question for their determination was the right to the possession. The second instruction did not assume that appellee was in the actual and peaceable possession of the premises, but simply stated, and with unusual accuracy, an abstract and correct principle of law, and without making any reference whatever to either of the parties to the controversy. It is claimed that there was no evidence upon which to base the third instruction. We think that even the evidence introduced by appellant herself was sufficient to show an actual, exclusive and peaceable possession by appellee. The fourth instruction was, in legal principle, like the third; and even if, as is suggested by counsel, it was "a straight jacket for the jury," yet it was well fitted to the case disclosed by the testimony.

The first instruction asked by appellant was so inaccurate and ambiguous in its phraseology that it could not easily have been understood by the jury, and was likely to either mystify or mislead them. It might well have been modified and given by the court; but if this had been done, it would have been of no benefit to appellant. There was no error in refusing it. The second instruction was covered by the instruction given by the court of its own motion. Instruction No. 3 was not based, and did not purport to be based, upon the evidence. Instruction No. 4 was directed only to a point which was immaterial to the issue. There was no evidence in the record to justify the giving of instructions 5, 6 and 8, and they were calculated to mislead the jury. The seventh instruction was obnoxious to the same criticism; and, moreover, it was objectionable for the reason that since the entry of appellant was forcible, no demand for possession was necessary.

There is no error in the record, and the judgment is affirmed.

Judgment affirmed.

EUGENE C. BATES *et al.*

v.

THE GREAT WESTERN TELEGRAPH COMPANY *et al.**Filed at Ottawa October 31, 1890.*

1. CORPORATIONS—*subscription for stock—after issue to others.* Stock in a private corporation, after its issue to outside parties, as owners thereof, is not the subject matter of subscription. A subscription must be for such stock as the company still owns and has not parted with.

2. SAME—*stockholders—contract diminishing liability—creditors.* As against creditors of a corporation, no contract made by the company can be allowed to stand which attempts to change a subscription into a purchase of paid up stock, or to diminish the amount to be paid by the stockholder.

3. The issue of certificates of stock to subscribers on payment of forty per cent of their subscriptions does not make them the holders of full paid stock in such sense as that they can not be called upon for the remaining sixty per cent, at the suit of creditors of the corporation.

4. SETTING ASIDE DECREE—*for fraud.* Where the only allegation of fraud for the setting aside of a decree is the suppression of certain contracts relating to the subject matter of the suit, which could not have changed the result if they had been produced and the attention of the court called to them, the bill seeking to set aside the decree upon that ground can not be maintained.

5. PARTIES—*on bill to dissolve an insolvent corporation—and to appoint a receiver.* The stockholders are not necessary parties to a bill by creditors to dissolve an insolvent corporation, and have a receiver appointed to wind up its affairs. The court acquires jurisdiction to appoint a receiver of corporate assets upon service of process on the corporation.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. M. F. TULEY, Judge, presiding.

Mr. GEORGE L. PADDOCK, and Mr. WILLIAM C. NIBLACK, for the appellants:

A corporation has no power to enter into contracts of subscription of its capital stock in excess of the amount authorized by its charter, and such contracts confer no rights and create

Brief for the Appellees.

no liabilities on stockholders. *Mackley's case*, L. R. 1 Ch. Div. 247; *Smith v. Mining Co.* 1 Mo. 428; *Lathrop v. Kneeland*, 46 Barb. 432; *Scoville v. Thayer*, 105 U. S. 143.

A corporation may receive in payment for its stock any property it may lawfully purchase. *Cook on Stockholders*, sec. 15, *et seq.*

When property is given for stock of a corporation the stock is full paid. *Steacy v. Railroad Co.* 5 Dill. 348; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Young v. Erie Co.* 65 Mich. 111; 27 Pa. St. 416; 4 Clifford, 508; *Phelan v. Hazard*, 5 Dill. 45; *Spencer v. Company*, 36 Iowa, 407.

Upon the ground of the prevention of a multiplicity of suits at law, a court of equity has jurisdiction of this bill. *Reid v. Gifford*, Hopk. 416; *Brinkerhoff v. Brown*, 6 Johns. Ch. 151; *Cadigan v. Brown*, 120 Mass. 493; 1 Pomeroy's Eq. Jur. sec. 250, *et seq.*; *Murray v. Hay*, 1 Barb. Ch. 59; Story's Eq. Pl. secs. 533-539; Story's Eq. Jur. sec. 854; *Railroad Co. v. Schuyler*, 17 N. Y. 592; *Board of Supervisors v. Deyoe*, 77 id. 219; *Black v. Shreeve*, 7 N. J. Ch. 440; *Caro v. Pensacola*, 19 Fla. 766; *Adams' Eq.* 199.

The receiver is an officer of the court, subject to its jurisdiction and direction, and when the complainants come into court and submit to its jurisdiction, the court will inquire into the validity of the contracts upon which the receiver is threatening to sue, and will, if necessary, restrain him from bringing suits which will in the end be futile. *In re Weaver*, 2 M. & C. 441; *Blundell v. Gladstone*, 9 Sim. 455; *Ambrose v. Union*, 8 Beav. 43.

MR. THOMAS J. SUTHERLAND, for the appellees:

The creditors of the company are not made parties defendant to the bill. *Richmond v. Irons*, 121 U. S. 54; *Tunesma v. Schuttler*, 114 Ill. 156.

The bill is not sufficiently specific as to the charges of fraud. *East St. Louis v. Millard*, 14 Bradw. 488; *Smith v. Brittenham*,

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98 Ill. 188; *Newell v. Bureau County*, 37 id. 253; *Allen v. Woodruff*, 96 id. 23; *Klein v. Horine*, 47 id. 432.

As to the liability under the contract of subscription, see *Telegraph Co. v. Gray*, 122 Ill. 635; *Moran v. Prather*, 23 Wall. 501.

As to the right of a corporation to acquire its own stock, see *Railroad Co. v. Marseilles*, 84 Ill. 145; *Taylor v. Miami Expert Co.* 6 Ohio, 83; *City Bank v. Bruce*, 17 N. Y. 507; *Williams v. Manufacturing Co.* 3 Mich. 452; *State v. Smith*, 48 Vt. 266; *Clapp v. Peterson*, 104 Ill. 26; *Wemple v. Railroad Co.* 120 id. 196; *Mann v. Cooke*, 20 Conn. 177.

If the person subscribing was induced to do so by fraud or misrepresentations, he should have repudiated the contract at the earliest moment, and before debts were contracted by the company. After that his right to rescind is lost. *Upton v. Tribilcock*, 91 U. S. 55; *Hamilton v. Insurance Co.* 67 Ga. 145; *Cook on Stockholders*, secs. 52, 54; *Taylor on Corp.* secs. 537, 701, 738; *McCarthy v. Lavasche*, 89 Ill. 270.

MR. JUSTICE MAGRUDER delivered the opinion of the Court:

This is a bill filed, in pursuance of leave obtained to do so, in the Circuit Court of Cook County on September 4, 1888, by certain stockholders in the Great Western Telegraph Company, on behalf of themselves and such other stockholders as might become co-complainants with them, against said company and Elias R. Bowen, a receiver of said company appointed by said Circuit Court in another suit therein pending and hereafter mentioned as the *Terwilliger* suit, praying that certain orders entered by said Circuit Court in said *Terwilliger* suit on July 10, 1886, and January 10, 1887, making an assessment against the stockholders upon the unpaid balances of their subscriptions to the stock of the Company for the purpose of paying the proven claims against the Company, be set aside as to the complainants, who are the appellants here, and also praying

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that said receiver be enjoined from bringing against complainants and the other stockholders the suits at law, authorized by said orders, for the recovery of the amount of such assessment. The Company and its receiver, defendants below and appellees here, demurred to the bill. The Circuit Court sustained the demurrer and dismissed the bill for want of equity. Such decree of dismissal has been affirmed by the Appellate Court, and the case is brought before us by appeal from the judgment of the latter Court.

On November 30, 1869, Jeremiah Terwilliger, a stockholder in said Telegraph Company, on behalf of himself and such other stockholders as might choose to come in, filed a bill in said Circuit Court against said company, and David A. Gage, its president, and Josiah Snow, its secretary and Treasurer, and one Selah Reeve, the contractor engaged to build the telegraph lines. The object of the Terwilliger bill, and its contents, in substance, are stated in *Terwilliger v. G. W. T. Co. et al.* 59 Ill. 249. After the cause was remanded to the Circuit Court, a decree was therein entered on November 16, 1872, in pursuance of the opinion of this Court in *Terwilliger v. G. W. T. Co. supra*. Various proceedings were afterwards had in said cause; a reference was taken to a Master to state an account between Reeve and the company as to the amount due for the construction of the lines; a cross-bill was filed by Reeve; a supplemental bill was also filed; a receiver was appointed; proofs were taken and findings made as to the number of creditors of the company and the amounts due them respectively, and as to the number of stockholders and the amounts of their subscriptions, etc.; a sale was made by the receiver of the assets and property of the company, and the proceeds of such sale were applied upon the debts, leaving a balance of about \$375,000.00, exclusive of interest, due to the creditors.

After such sale and the application of its proceeds, and on April 10, 1886, the defendant Bowen, who had been appointed

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as the successor to the former receiver, filed his petition in the said court, entitled in the original Terwilliger suit and also in the cross and supplemental suits, alleging that the company had no property, and that the stockholders (with the exception of a few who had paid in full) had only paid from five to forty per cent of their subscriptions to the stock, and that the remaining sixty per cent was still due and unpaid, and praying that a call be made upon the stockholders, who had not paid the full amount of their subscriptions. After a reference under said petition, and proofs taken, the orders of July 10, 1886, and January 10, 1887, heretofore mentioned were entered. The January order was merely a supplement to and extension of the July order.

The Great Western Telegraph Company was organized under "An Act for the establishment of Telegraphs" approved February 9, 1849, which provided that the persons associating themselves together for the purpose of constructing a line of telegraph should make, acknowledge, and record in the county clerk's office and in the office of the Secretary of State, a certificate specifying among other things "the capital stock of such association and the number of shares into which the stock shall be divided." The certificate organizing the appellee company, which bears date December 2, 1867, and was duly acknowledged and recorded as required by the Act, recites that "the amount of the capital stock of said association is \$3,000,000.00 divided into 120,000 shares of \$25.00 each."

The July and January orders above mentioned find the allegations of the petition to be true and decree that an assessment be made upon the stockholders of 35 per centum of the par value of the shares subscribed for by them, being \$8.75 on each share, and that said stockholders pay said assessments to the receiver upon demand made by him. It is conceded that the complainants and the other stockholders have not paid any more than \$10.00 on each share of \$25.00, or 40 per cent of the face value of each share.

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The bill in the present case sets forth the pleadings in the Terwilliger case and the decree therein of November 16, 1872, and the other proceedings therein as here referred to, and the organization of the company as here stated. The bill also sets forth in full an exact copy of the form of the subscription paper, or contract for subscription, signed by the stockholders, which is as follows:

"Capital, \$3,000,000; shares, \$25; assessment not to exceed \$10 on a share. Subscription list for the capital stock of the Great Western Telegraph Company.

"We, the subscribers hereunto, for value received, severally, but not jointly, agree to take the number of shares in the capital stock of the Great Western Telegraph Company placed opposite our respective names, and pay for the same in installments, to-wit: Five per cent on amount paid in, and the balance as the directors, from time to time, may order. In consideration thereof the Great Western Telegraph Company agree that when forty per cent of the par value of the shares shall have been paid under such orders, and the installment receipts therefor surrendered to the company, the number of shares severally subscribed by the undersigned shall be issued to them as full paid stock of said company.

" is appointed agent to solicit and receive only the first installment of five per cent (fifty cents on a share) at the time of subscribing.

NAMES.	Residence.	Date of Subscription.	No. of Shares.	

This is the exact form of subscription contract, which is set forth in *Great Western Telegraph Company v. Gray*, 122 Ill. 630. In the *Gray* case it was claimed, that the stockholder subscribing this contract was only liable to pay forty per cent

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of the par value of each share, that is to say, \$10.00 instead of \$25.00 on each share, but we there decided, that the liability upon such contract was for the par value of each share, and that the stockholders, who had paid only forty per cent, could be called upon, for the remaining sixty per cent.

The order of assessment, mentioned in the declaration in the *Gray* case, is the same order which is sought to be set aside in the case at bar; and the ground, upon which the relief in question is now asked, is that there was fraud in the procurement of such order or orders of assessment. The charges of fraud, as made in the bill, are somewhat indefinite, but stripped of verbiage and sifted down to their real meaning they amount to this: that the Circuit judge, who entered these orders, was deceived and imposed upon; that there was a suppression of a part of the evidence which should have been presented to him; that his attention was called only to the subscription paper signed by each stockholder, and not to certain contracts and other instruments executed in 1868 by Reeve and Snow and the Telegraph Company; that, if such contracts and instruments had been brought to the attention of the chancellor, he would not have entered the orders of assessment now complained of. In other words, the point is here made, that the contract of subscription as above set forth, considered in connection with the contracts and instruments so executed in 1868, will show each of the stockholders now complaining to be a purchaser of stock from Reeve at \$10.00 per share, and not an original subscriber for stock at \$25.00 per share; and, upon this theory, the appellants claim, for themselves and those whom they seek to represent, that they did not contract directly with the company as subscribers for stock, but that Reeve was the owner of the stock and sold it to them, and that, therefore, they cannot be held liable for the sixty per cent remaining unpaid. We are unable to concur in the view which the appellants thus take.

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The contracts and other instruments heretofore referred to as executed in 1868 will be designated, for the sake of brevity, as the Reeve contracts. Is there anything in the Reeve contracts, which can change or vary the liability of a subscriber to the subscription paper above set forth as we have decided such liability to be in the *Gray* case? We think not.

On March 25, 1868, a contract was made between Reeve and the Company by which he agreed to construct, equip and complete 2000 miles of telegraph line, and, in consideration thereof, the Company agreed "to issue and deliver to him certificates for shares in the capital stock of the Great Western Telegraph Company, to wit: 120,000 shares on the execution of this agreement; the said shares to be owned and represented by said Selah Reeve in all meetings of the shareholders of said company until such time as the same shall be *subscribed* and fully paid for by other parties." The whole number of shares into which the capital stock of the company was to be divided, as above stated, was 120,000 shares, and, at the date of this contract, 2103 of these shares were held by other parties, according to the statement in the certificate of organization, leaving only 117,897 shares to be issued and delivered under the terms of the contract.

On the same day, March 25, 1868, Reeve executed a trust deed to Snow wherein he assumed to "sell and assign to said Josiah Snow * * * (to take and receive the same from said Company) 117,897 shares of said stock, so agreed to be delivered as aforesaid. To have and to hold the same * * * upon trust to sell and dispose of the same to such persons as the said party of the second part (Snow) by himself, or through the Great Western Telegraph Company or any of his or their agents shall procure as *subscribers* to said stock, at a rate of not less than \$10.00 per share, and to pay over and apply the proceeds of said stock * * * for the prosecution of the work at the times and in the manner and for the purposes prescribed in the before mentioned contract and all *supplements*

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thereto, if any are made." Snow is also therein authorized as the agent of Reeve to receive the stock from the company and to sell and dispose of it by himself or through agents, and apply the proceeds for the performance of the contract.

On the next day, March 26, 1868, a supplementary agreement was entered into between Reeve and the Company and Snow, as trustee, in which Snow is authorized "to employ the Great Western Telegraph Company, or such other agents as the trustee may appoint to sell and dispose of said stock by *subscription*," and to agree with the company to "furnish and transfer" to it such number of shares of the stock as it "may procure to be subscribed for" at the rate at which the trustee is empowered to sell the same, provided the company pays to the trustee \$10.00 per share less fifty cents per share to be retained as a commission "for the sale or procurement of *subscriptions* for said stock;" Reeve also agrees to procure and transfer to the trustee the 2103 shares already subscribed for; the Company agrees to aid in the "sale and disposal by *subscription* of the stock;" the trustee is authorized to pay Reeve for the work of construction at certain rates per mile out of the moneys "resulting from sales of or *subscriptions* for said stock;" the contract contains this provision: "the title and right to represent the stock sold and assigned in trust by said Reeve shall remain in the trustee until such time as the same shall be fully paid for by parties purchasing or *subscribing* for the same."

On March 27, 1868, Snow, as trustee, executed a power of attorney reciting that he appoints "the Great Western Telegraph Company, by its proper officers, agents for the disposal by *subscription* of the 117,897 shares" aforesaid, and also therein reciting, that he will deliver and transfer to the company any amount of stock which it may procure to be *subscribed* upon the payment to him of \$9.50 for each share by the company in the manner prescribed in the foregoing agreements and trust deed.

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On October 26, 1868, another contract was made between the company and Snow, trustee, and Reeve, contractor, explaining and enlarging the former agreements, but it is not necessary to consider the October contract as the present appellants, and the other stockholders whom they seek to represent, signed their subscription papers in June, July and August, 1868, before the making of the October contract.

If these Reeve contracts, which have been set aside as invalid and fraudulent, could be regarded as valid and binding between the parties to them, what do they amount to? Reeve agreed to build 2000 miles of telegraph lines for the company, and the company agreed to pay him for so doing the sum of \$9.50 out of the subscription money to be collected on each share of its stock; the contracts and trust deed and power of attorney above mentioned together constituted an arrangement, by which the company sought to secure for itself the performance of the work by Reeve, and by which Reeve sought to secure for himself the money that was to be paid to him. When these papers were drawn, Reeve had performed no work for which he was entitled to have any of the stock; he never paid a dollar for any of the stock; no certificate of stock was ever issued to him, or to Snow as his trustee. If the company was spoken of as agent, it was only agent to apply a certain part of the subscription money towards the payment of the cost of constructing the lines. The Company was not agent for the purpose of selling full paid stock, or stock certificates, belonging to Reeve, or Snow, trustee, to third parties. The word "*subscription*" is used in almost every paragraph of the contract. When men *subscribe* for the stock of a company, it is for such stock as the company still owns and has not parted with. Stock, which has been issued to or passed into the ownership of outside parties, cannot be subscribed for; it is not then the subject-matter of subscription.

In the present case, the subscription contracts were made by the subscribers thereto directly with the company. There

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is nothing upon the face of the contracts to indicate that the company was taking the subscriptions as agent for Reeve or Snow. No one of these stockholders knew, when he signed the contract, that he was dealing with the company as agent; no one of them supposed that he was buying stock from Reeve or Snow; no one of them had any information that Reeve or Snow had any interest in the stock for which he was subscribing. It is averred in the bill in the present suit, that the stockholders knew nothing about the Reeve contracts when they signed their subscription papers, and that those contracts were never produced until long afterwards during the progress of the *Terwilliger* litigation. No representations were made to them by the officers of the company when they became stockholders, that they were buying full paid stock that had passed from the company to Reeve and Snow. There having been no such representations, and there having been no knowledge of the Reeve contracts, how can the stockholders now say to this receiver and to the creditors represented by the receiver, that their subscription papers do not mean what they say upon their faces, but that their true meaning can only be ascertained when they are construed in connection with the Reeve contracts?

Sometimes several instruments executed at the same time and as parts of one transaction may be regarded as one, but there is no such state of things here. The subscription contracts were not made at the same time with the Reeve contracts, nor between the same parties, nor in relation to the same subject matter. The subscriptions to the capital stock of a company are assets for the payment of its debts. The unpaid balances due upon such subscriptions belong to the creditors. As against creditors, no contract made by the company can be allowed to stand, which attempts to change a subscription into a purchase of full-paid stock, or to diminish the amount agreed to be paid by the stockholder, through such jugglery as is embodied in the Reeve contracts.

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In passing upon the issues made upon the original bill in the *Terwilliger* case, we there said in regard to these same Reeve contracts: "This stock, which the corporators thus professed to hold, was purely fictitious. No money was paid by any of them and the stock represented no value. Selah Reeve, who professed to hold nearly all of it, was insolvent.

* * * The rate of compensation to be paid Reeve was, as shown by the evidence, largely in excess of the cost of construction. * * * Up to the time of the commencement of this suit no certificates of stock had been issued. * * *

The very circumstances, under which the contract was made, were such as to show that the interests of the company were disregarded. The contract, indeed, was, in the then condition of affairs, almost a farce, for it was a contract between a company without a dollar of paid capital, or even a dollar of subscription that was expected to be paid, and one of their own number, who was a bankrupt, for the construction of 2000 miles of line to cost from \$600,000.00 to \$1,200,000.00, etc.

* * * In the case before us it is apparent that the only real stockholders in this company are the persons *who have paid their money as subscribers*. The stock taken by the original corporators * * * was all a sham. It was purely fictitious representing nothing. * * * In our judgment this entire contract with Reeve was a fraud upon the future shareholders, by whose *subscription* alone it was expected to construct the line. * * * The contract with Reeve had a fraudulent purpose. Not a dollar was expended under it until money was obtained from *bona fide subscribers*, and not a dollar was expected to be when it was made. * * * The decree of the Circuit Court will be reversed and the cause remanded. That court will render a decree setting aside all the contracts made between the company and Selah Reeve."

It will thus be seen, that in the *Terwilliger* decision this court held the Reeve contracts to be fraudulent, and ordered them to be set aside, and it will be further noted that, in that

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decision, the *bona fide* stockholders are treated as original subscribers to the capital stock of the company, and not as purchasers of the fictitious stock claimed to be owned by Reeve.

It is claimed by the appellants, that this Court released the stockholders from the obligation to pay any more than forty per cent on their contracts by directing, in the opinion in the *Terwilliger* case, that certificates of stock be issued to those who had paid the forty per cent. Such cannot be regarded as the effect of the opinion in that case. There the rights of creditors were not involved; the controversy there was between *bona fide* stockholders on the one side, and the pretended holders of fictitious stock, who sought by means of such fictitious stock to control the company, and crowd out the *bona fide* subscribers and prevent the latter from obtaining their certificates, on the other side. Here the controversy is between creditors and subscribers to the capital stock. There, the court merely granted a specific performance of the contract of subscription, which authorized the subscriber to have a certificate when he paid forty per cent, but this did not make him a holder of full paid stock in such sense that he could not be called upon to pay the remaining sixty per cent of his subscription. The certificate is merely one of the evidences of the existence of the relation of stockholder. (*Union Mut. Life Ins. Co. v. Frear Stone Co.* 97 Ill. 537; *Wemple v. St. L., J. & S. R. R. Co.* 120 id. 196; *New Albany & S. R. R. Co. v. McCormick*, 10 Ind. 501; *Rutter v. Kilpatrick*, 63 N. Y. 606; *Wheeler v. Millar*, 90 id. 357; *Fulgam v. Macon & Brunswick R. R. Co.* 44 Ga. 598; *Mitchell v. Beckman*, 64 Cal. 121; *Chester Glass Co. v. Dewey*, 16 Mass. 94.) We passed upon this precise point in the *Gray* case, *supra*, where it was said: "The company's promise, when forty per cent is paid, to issue certificates for the shares as full paid stock, may well consist with defendant's promise to pay the par value of the shares, and the issuance of such certificates after the payment of forty per cent may well consist with the liability remaining on the

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defendant to pay the other sixty per cent." This being so, the liability is not changed by the fact that the company was heretofore directed by order of court to do what it contracted to do in the subscription paper. Nor was the liability of the *bona fide* stockholders to the creditors of the company diminished in any way by the fact, that Reeve, and those acting with him, tried to defraud such *bona fide* stockholders through the medium of the scheme embodied in the Reeve contracts. (*Un. Mut. Life Ins. Co. v. Frear Stone Co. supra.*)

We are, therefore, of the opinion that it would have been the duty of the Circuit Court to enter the orders of assessment if the Reeve contracts, which are alleged to have been concealed from its notice, had been brought to its attention and had been fully considered in connection with the subscription papers. As the only fraud charged consisted in the alleged suppression of those contracts, and as their production could not have changed the result, the demurrer to the bill was properly sustained.

As to the point that the stockholders were not parties to the proceeding in which the orders of assessment were entered, a majority of this court held, after careful consideration, in *Great Western Telegraph Co. v. Gray, supra*, that it was not necessary for the stockholders to be before the court. It was there said: "There was no purpose in that case (*Chandler v. Brown*, 77 Ill. 333,) to depart from the well established general rule that a court acquires jurisdiction to appoint a receiver of corporate assets by service of process upon the corporation. The stockholder is represented in his interest, as such, by the presence of the corporation. (2 Morawetz on Corp. sec. 822; *Ward v. Farwell*, 97 Ill. 593; *Glenn v. Williams*, 20 Md. 93; *Sawyer v. Upton*, 91 U. S. 56.) * * * In order for the board of directors to have made a valid order for payment, it would not be contended, we presume, that defendants should have been before the board. No more, we conceive, was it necessary that defendant should have been before the court

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when it, in place of the directors, made the call or order of assessment."

Without consideration of the other objections, several of which have much force, made by the appellees to the power of a court of equity to entertain jurisdiction of a bill, like this, which seeks to review or set aside such orders of assessment as those which have been herein under discussion, we think that, for the reasons above stated, the Circuit Court committed no error in dismissing the present bill.

The judgment of the Appellate Court is, therefore, affirmed.

Judgment affirmed.

CRAIG and SHOPE, JJ., dissenting.

JOHN ANDERSON

v.

A. J. GRAY.

Filed at Mt. Vernon November 5, 1890.

1. JURISDICTION—*of inferior courts—must appear.* The jurisdiction of inferior courts of limited jurisdiction must affirmatively appear in every case, for the reason that nothing will be presumed in its favor.

2. SAME—*of county courts—presumption.* County courts in this State, in the exercise of the common law jurisdiction conferred on them by statute, are entitled to the same presumptions in favor of their jurisdiction as circuit courts. They are courts of record, and have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine that jurisdiction.

3. SAME—*jurisdiction of the person—in county court—presumption.* The record of a judgment in the county court failed to show, affirmatively, service of process on the defendant, or his appearance: *Held*, that the judgment could not be considered void for want of jurisdiction of the person of the defendant, every reasonable presumption being in favor of the judgment.

4. EXECUTION SALE—*to be supported by a proper judgment.* It is essential to a sale of land under an execution, that the process shall have

134	660
181	187
184	550
184	91
184	573
185	60

Brief for the Appellant.

a judgment of a court of competent jurisdiction on which to rest. If the execution issues without authority, it will be void. Therefore, it should show upon what judgment it is issued.

5. *SAME—judgment and execution—variance.* A variance between the Christian name of the nominal plaintiff in a judgment and in an execution issued thereon, and also as to the amount of the judgment, will not be fatal to a levy upon and sale of the debtor's land, if it appears from the whole record that the execution was in fact issued under the judgment.

6. In a cause docketed as *Jane Mercer*, for the use of G. W. Hacker, against Humble and Peterson, the plaintiff obtained judgment against Peterson alone, and the cause was continued as to Humble, for the want of service in time on him. At the next term of the court the record showed a judgment in the case of *James Mercer*, for the use of G. W. Hacker, against Humble, for the same debt and damages as in the judgment of the preceding term. There was a levy of an execution upon land, and a sale. The execution, certificate of purchase and sheriff's deed recited a judgment in favor of James Mercer, for the use, etc., and against both Humble and Peterson, at the last named term. The proof showed there was but one suit for the use of Hacker: *Held*, that while the proceedings were irregular, it was evident that the execution issued in the suit of *Jane Mercer*, and that the sheriff's sale and deed passed the title of Peterson in the land levied upon.

7. *EJECTMENT—outstanding title—by whom to be asserted—as to a mere trespasser.* A mere trespasser, who takes forcible possession of land without title, when sued in ejectment, will not be allowed to set up an outstanding title.

8. Where a purchaser of land takes possession under his deed, there being no one in possession at the time, the deed will be sufficient to protect his possession against a mere trespasser without title, regardless of the title of the vendor.

APPEAL from the Circuit Court of Johnson county; the Hon. ROBT. W. McCARTNEY, Judge, presiding.

Mr. WILLIAM A. SPANN, for the appellant:

The record fails to show a service on Peterson, or that the court had jurisdiction of his person.

There is a fatal variance between the record of the judgment and the execution thereon and the subsequent proceedings.

The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of his adversary's.

Brief for the Appellee.

Marshall v. Barr, 35 Ill. 106; *Stuart v. Dutton*, 39 id. 91; *Hague v. Porter*, 45 id. 318; *Vallette v. Bennett*, 69 id. 632; *Cobb v. Lavalle*, 89 id. 331.

The defendant had the right to show an outstanding title in defense. *Jackson v. Morse*, 16 Johns. 197; *Hulick v. Scovil*, 4 Gilm. 159; *Doty v. Burdick*, 83 Ill. 473.

Mr. A. K. VICKERS, for the appellee:

The only objections available collaterally are such as go to the jurisdiction. *Rigg v. Cook*, 4 Gilm. 336.

The county court is a court of general jurisdiction, and presumptions will be made in favor of such jurisdiction. Freeman on Judgments, sec. 122; *Ex parte Watkins*, 3 Pet. 193; *Propst v. Meadows*, 13 Ill. 157; *Von Kettler v. Johnson*, 57 id. 109; *People v. Lott*, 36 id. 451.

Secondary evidence is proper to show the contents of a lost execution. *Dunlap v. Berry*, 4 Scam. 327; *Ellis v. Huff*, 29 Ill. 449; *Becker v. Quigg*, 54 id. 390.

The sheriff's deed is *prima facie* evidence of the existence and regularity of the execution. Rev. Stat. chap. 77, sec. 33; *Keith v. Keith*, 104 Ill. 397; Rorer on Judicial Sales, secs. 803, 804.

A variance is immaterial if enough appears to show that the execution was issued upon this judgment. It is simply a question of identity. *Phillips v. Coffee*, 17 Ill. 157; *Loomis v. Riley*, 24 id. 307; *Hayes v. Bernard*, 38 id. 303.

When the court has jurisdiction of the subject matter and the parties, proceedings will not be questioned collaterally. *Buckmaster v. Ryder*, 12 Ill. 207; *Lane v. Bommelman*, 17 id. 95; *Durham v. Heaton*, 28 id. 264; *Mulford v. Stalzenbach*, 46 id. 303; *Feaster v. Fleming*, 56 id. 457; *Rockwell v. Jones*, 21 id. 279.

The defendant in execution is estopped from disputing the purchaser's title, or of setting up an outstanding title in a

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third party. *Hayes v. Bernard*, 38 Ill. 297; *Gould v. Hendrickson*, 96 id. 600; *Ferguson v. Miles*, 3 Gilm. 358.

Plaintiff's deed, with proof of possession taken under claim of title, was sufficient to entitle him to recover, unless a better judgment title was shown. *Barger v. Hobbs*, 67 Ill. 592; *Mason v. Park*, 3 Scam. 532.

A mere trespasser can not show an outstanding title in another. *Jackson v. Harder*, 4 Johns. 203; *Davis v. Easley*, 13 Ill. 200; *Hardin v. Forsyth*, 99 id. 312.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

This was an action of ejectment, by appellee, against appellant, to the April term, 1882, of the Johnson circuit court, to recover possession of the south half of the north-west quarter of section 15, township 12, range 3 east, in said county. Three judgments have been rendered,—the first in favor of plaintiff, and the second in favor of defendant, each taking a new trial under the statute. At the April term, 1889, the present judgment was rendered in favor of plaintiff, and defendant appeals.

Both parties proved title in one Owen G. Peterson. Plaintiff claims title from him through a sheriff's sale to George W. Hacker, and deed from said Hacker to himself. To sustain the sheriff's sale he offered in evidence, first, the record of a judgment in the county court of said Johnson county, rendered at the June term, 1873, the title of the case, as shown by the record, being, "Jane Mercer, for the use of G. W. Hacker, *vs.* R. M. Humble and Owen G. Peterson, Def'ts." The judgment was by default, against Owen G. Peterson alone, for \$18.64 damages and \$84.80 debt, total amount \$103.44, and costs. It is recited in that judgment that the cause is to "stand continued until the next term of this court as to R. M. Humble, one of the defendants, service not being had in time for the present term of this court." He next offered a record of a judgment of the same court, rendered at the July term, 1873,

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the title of the case being, James Mercer, for the use of G. W. Hacker, against the same defendants.—Debt. This judgment is against R. M. Humble, for the same amount of damages and debt named in the former judgment. He then offered a certificate of purchase for the lands in suit, to said G. W. Hacker, by the sheriff of said county, in which it is stated that the sale was made by virtue of an execution in favor of *James Mercer*, for the use of George W. Hacker, and against R. M. Humble and Owen G. Peterson, for \$129.15, debt and interest and costs. Also, a sheriff's deed dated March 15, 1875, to said Hacker, which recites: "Whereas, *James Mercer*, for the use of George W. Hacker, did, at the July term, 1873, of the county court of the county of Johnson, recover a judgment against R. W. Humble and Owen G. Peterson for the sum of \$103.45 and costs of suit, upon which judgment an execution was issued," etc., reciting levy and sale thereunder. The amended bill of exceptions shows that he also offered in evidence a deed from said Hacker to himself.

Neither of the records of said judgments in the county court shows affirmatively that the court had jurisdiction of the persons of the defendants when the judgments were rendered, and it is insisted on behalf of appellant that for that reason the judgments are void. County courts in this State, in the exercise of the common law jurisdiction conferred upon them by statute, are entitled to the same presumption in favor of their jurisdiction as circuit courts. They are courts of record. The practice in them is the same as in the circuit courts. They have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine that jurisdiction. These characteristics distinguish them from courts of inferior, limited jurisdiction, in which jurisdiction in every case must affirmatively appear. (*Guynon et al. v. Astor et al.* 2 How. 125; *Fox v. Hoyt*, 12 Conn. 491; 31 Am. Dec. 763; *Freeman on Judgments*, sec. 122; 4 Am. and Eng. Ency. of Law, p. 453, and

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cases cited.) The judgments are not void for want of jurisdiction of the person.

The original papers, including the execution on which the sale was made, were shown upon the trial to have been lost. Manifestly, the execution, as shown by the certificate of purchase and sheriff's deed, did not correctly describe either of the judgments offered in evidence, and appellant insists that the variance is fatal. Freeman, in his work on Executions, (sec. 43,) says: "There is a great distinction between executions issued without authority and executions issued under an authority which is erroneously pursued. * * * The former class is void; the latter may be termed irregular or erroneous. It is necessary that an execution have a judgment to support it, and it should appear from the execution what judgment is intended to be enforced. * * * When the execution is offered in evidence it may vary from the judgment in some respects and correspond with it in others. The question then before the court, is, did this *execution* issue on this *judgment*? If, from the whole writ, taken in connection with other facts, the court feels assured that the execution offered in evidence was intended, issued and enforced as an execution upon the judgment shown to the court, then we apprehend that the writ ought to be received and respected." *Phillips et al. v. Coffee*, 17 Ill. 157; *Hayes v. Bernard*, 38 id. 297.

That there was great irregularity in the proceedings under which the judgments offered in evidence were rendered must be admitted. The evidence clearly shows that there was, in fact, but one suit for the use of George W. Hacker against Peterson and Humble, in that court, on which these two judgments were obtained. The witnesses all speak of the lost papers as "in the case of Jane Mercer, for the use of George W. Hacker, *vs.* O. G. Peterson and R. M. Humble." It is not pretended that there was such a suit as "*James Mercer*, for the use," etc., pending at the July term of said court. No such papers were lost. It is clear, therefore, that in the suit of

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Jane Mercer to the June term, both these judgments were entered; that service on Humble not being in time for that term, the plaintiff erroneously took judgment against Peterson, and continued the case as to Humble to the next term, when judgment was entered against him for the same damages and debt, the attempt being, in that way, to make him a party to the judgment. Notwithstanding the manifest error in entering these judgments, the one against Peterson was not void, and we entertain no doubt, from all the facts in evidence, that the execution under which the sale was made was intended to enforce that judgment. We are therefore of the opinion that by the sheriff's deed to Hacker, Peterson was divested of his title to the premises in question.

It is also shown by the plaintiff below, and not denied by the defendant, that when plaintiff got his deed from Hacker, Peterson was not occupying the premises, though he had previously done so. Plaintiff took possession under his deed, and occupied the premises, by his tenants, for some two years, when the defendant went upon the same and forcibly took possession. So far as the record discloses, he then had no title whatever to the lands. Plaintiff's deed from Hacker was sufficient to protect his possession against a trespasser without title, regardless of the validity of the sheriff's sale to Hacker. (*Barger v. Hobbs*, 67 Ill. 592.) Being, at the time he took possession, a trespasser without title, appellant could not set up an outstanding title in another. (*Jackson v. Harder*, 4 Johns. 203.) This rule is recognized in *Hardin v. Forsythe*, 99 Ill. 312.

Something is said about his having entered under claim of a tax title. There is not the slightest proof of such a title, or even a pretense that the land had at any time been sold for taxes. He does not himself claim that he had title when he took down the fence, drove over the occupant's growing crops, and forced the house open, in which he put his tenant. It appears that in 1884, long after this suit was brought and after it had been once tried, Peterson, then in Texas, executed

Syllabus.

to appellant a quitclaim deed. There is no evidence whatever that prior to that time, Peterson, directly or indirectly, set up any claim to these lands, or made any objections to the proceedings under which they were sold. Appellant now seeks to justify his possession under that deed. The court below very properly held that he could not do so.

The judgment of the circuit court will be affirmed.

Judgment affirmed.

THE STERLING GAS COMPANY

v.

HOMER H. HIGBY, Collector.

Filed at Ottawa October 31, 1890.

1. **TAXATION**—*as to corporations—classifying corporations—rule of uniformity—constitutional limitation.* The constitution does not prohibit the legislature from placing certain specified corporations in one class, and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class, and providing a uniform mode of assessment for that class, different from the first class. The rule of uniformity in the constitution applies to the class, and not to all corporations alike.

2. The fourth clause of section 3 of the Revenue act, as amended in 1879, which provides for the assessment of the capital stock and franchise of a certain class of corporations by the State Board of Equalization, and of other corporations by the local assessors, is not in conflict with section 1, article 9, of the constitution, in its requirement of uniformity.

3. **SAME—former decisions.** In this case, the rulings in *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, and *Ottawa Gas Light and Coke Co. v. Downey*, 127 id. 201, are brought in review, and adhered to.

4. **SAME—capital stock and franchise—as corporate property—for purposes of taxation.** Both the capital stock of a private corporation and its franchise are corporate property, for the purposes of assessment and taxation.

5. The power to impose a tax upon the capital stock and franchise of corporations formed for pecuniary profit is not confined to the first

134	557
138	346
134	557
153	624
134	557
68a	522
134	557
78a	441

134	557
188	18
134	557
196	1837
184	557
e211	50
311	52

Brief for the Appellant.

clause of section 1, article 9, of the constitution of 1870. The second clause is not confined to occupations, but also applies to property rights.

6. *SAME—State Board of Equalization—basis of its action in fixing valuations.* The State Board of Equalization is not concluded by the valuation placed upon the property of a corporation by its officers, nor is it essential that it should first hear evidence in fixing the taxable value of property or in changing the valuation returned by the corporation. The board may act upon its own judgment.

7. *SAME—return by corporation—presumption.* Where a bill seeking to enjoin a tax assessed on the capital stock of a corporation fails to show what return was made by the corporation in respect to its corporate indebtedness, it will be presumed that the return was such as to justify the assessment made.

8. *CHANCERY PLEADING—allegation of fraud—sufficiency.* The statement in a bill to enjoin the collection of a tax, that the action of the State Board of Equalization was fraudulent, is merely the statement of the conclusion or opinion of the pleader. It devolves on the party claiming fraud to state the facts relied on as constituting it.

9. *SAME—admission by demurrer.* Where the facts alleged in a bill do not necessarily amount to fraud, a demurrer to the bill does not admit fraud. Facts alleged for the purpose of showing fraud are to be taken most strongly against the pleader.

10. *CONSTITUTION—construction—adopting provisions of prior constitution, and the construction thereof—presumption.* It must be presumed that when the present constitution was adopted it was with full knowledge of the interpretation that had been placed by this court upon the language incorporated therein, which was taken from the prior constitution.

APPEAL from the Circuit Court of Whiteside county; the Hon. J. D. CRABTREE, Judge, presiding.

Mr. JOHN G. MANAHAN, for the appellant:

An act for taxing personal property, and not including credits, is unconstitutional, as making an unauthorized exemption. *Trustees v. McConnel*, 12 Ill. 138; *Cooley on Taxation*, chap. 6, sec. 134; *Cooley's Const. Lim.* 616, *et seq.*

The legislature can not exempt a portion of the State or municipality from taxation. *People v. Barger*, 62 Ill. 452.

Equality and uniformity are the controlling principles. *Liv- ington County v. Weider*, 64 Ill. 427.

Brief for the Appellant.

Taxes must be uniform. *Sleight v. People*, 74 Ill. 47.

The omission to assess the horse railway company renders the whole levy of assessment void. *Chicago v. Baer*, 41 Ill. 306.

An ordinance which assessed real estate, only, for taxation, was held void, because it omitted and thereby exempted personal property. *Primm v. City of Belleville*, 59 Ill. 142.

A law of Texas taxing sleeping cars not owned by railroads, and exempting those owned by railroads, was held to be unconstitutional and void. *Car Co. v. Texas*, 64 Texas, 274; *Sprague v. Thompson*, 118 U. S. 80; *Allen v. Lawrance*, 13 Otto, 90.

In fact, section 1, of article 9, of our State constitution, lays down the requirement, that every one shall pay a tax in proportion to his property, and every law which in terms violates the universality and uniformity here enjoined, is necessarily unconstitutional and void.

The bill of complaint herein also distinctly charges that the Board of Equalization was informed, previous to said assessment, that the said capital stock of the complainant company had no other or further value than that of the company's tangible property then assessed, and that the said board, without any attempt to obtain further information, and without any knowledge in the premises other than that afforded by the company, and with the intent to impose said burden upon the company regardless of the true value of said alleged capital stock, fraudulently imposed the assessment complained of. This is confessed by the demurrer.

This assessment having been fraudulently made by the State Board of Equalization, from whom there is no appeal, and for whose errors and malfeasance there is no remedy save in a court of equity, will authorize the interposition of a court of equity, where, as in this case, an assessment has been made in violation of the statute, which requires such board to "ascertain," in some mode, the fair cash value of said capital stock before attempting to assess the same. *Railroad Co. v.*

Brief for the Appellee.

Hodges, 113 Ill. 323; *Railroad Co. v. Cole*, 75 id. 591; *Lebanon v. Railway Co.* 77 id. 539.

Mr. WALTER STAGER, for the appellee:

The statute authorizing the State Board of Equalization to assess the capital stock of corporations for the purpose of taxation, is not in conflict with the constitution. *Porter v. Railroad Co.* 76 Ill. 561; *Railway Co. v. Miller*, 72 id. 144; *Life Ins. Co. v. Pollak*, 75 id. 292; *Glass Co. v. McCaleb*, 81 id. 556; *Hopkins v. Taylor*, 87 id. 436; *Danville Banking Co. v. Parks*, 88 id. 171; *Railroad Co. v. Siders*, id. 320; *Danville Manf. Co. v. Parks*, id. 463; *Railroad Co. v. Raymond*, 97 id. 213; *Coal Co. v. Finlen*, 124 id. 666.

The provisions of division 4 of section 3 of the Revenue act, as amended in 1879, (Laws of 1879, p. 251,) for assessing certain enumerated classes of corporations by the State Board of Equalization, and for assessing other enumerated classes as individuals, do not conflict with section 1, article 9, of the constitution of 1870, empowering the legislature to tax corporations by "general law, uniform as to the class upon which it operates," as the legislature is not thereby prohibited from classifying corporations for taxation. *Coal Co. v. Finlen*, 124 Ill. 666; *Timm v. Harrison*, 109 id. 593.

An omission to assess some other persons liable to taxation, or to assess a portion of the taxable property of others, does not affect the validity of a tax. *Merritt v. Farris*, 22 Ill. 303; *Schofield v. Watkins*, id. 66; *Dunham v. Chicago*, 55 id. 357; *Spencer v. People*, 68 id. 510; *People v. Lots in Ashley*, 122 id. 297; *Coal Co. v. Finlen*, 124 id. 666.

The State Board of Equalization is not bound by the valuation fixed by the officers of a corporation upon its property. *Railroad Co. v. Surrell*, 88 Ill. 535; *Railroad and Coal Co. v. Stookey*, 122 id. 358.

The courts can not examine the mode of reasoning or the basis adopted by the State Board of Equalization to ascertain

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the value of property. *Life Ins. Co. v. Pollak*, 75 Ill. 292; *Railroad Co. v. Raymond*, 97 id. 212; *Exchange v. Gleason*, 121 id. 502.

Mr. JUSTICE BAKER delivered the opinion of the Court :

By this bill in chancery appellant sought to enjoin the collection of a tax assessed against its capital stock by the State Board of Equalization, for the year 1885. The circuit court of Whiteside county sustained a demurrer to and entered a decree dismissing the bill. Two grounds are relied upon to reverse that decree.

First—The first contention of appellant is, that the fourth division of section 3 of the Revenue act, as amended in 1879, violates the rule of uniformity provided for by section 1, of article 9, of the constitution of 1870.

The section of the constitution in question reads as follows : "The General Assembly shall provide such revenue as may be needful, by levying a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property,—such value to be ascertained by some person or persons to be elected or appointed in such manner as the General Assembly shall direct, and not otherwise ; but the General Assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, inn-keepers, grocery-keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall, from time to time, direct, by general law, uniform as to the class upon which it operates."

Section 3 of the Revenue act, as amended in 1879, provides, among other things, as follows : "Personal property shall be valued as follows : * * * *Fourth*, the capital stock of all companies and associations now or hereafter created

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under the laws of this State, (except those required to be assessed by the local assessors, as hereinafter provided,) shall be so valued by the State Board of Equalization as to ascertain and determine, respectively, the fair cash value of such capital stock, including the franchise, over and above the assessed value of the tangible property of such company or association.

* * * *Provided, further*, that companies and associations organized for purely manufacturing purposes, or for printing, or for publishing of newspapers, or for the improving and breeding of stock, shall be assessed by the local assessors, in like manner as the property of individuals is required to be assessed."

In *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, it was held that the constitution does not prohibit the legislature from placing certain specified corporations in one class, and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class, and providing a uniform manner of assessment for that class different from that in the other class; and that the rule of uniformity in the constitution applies to the class, and not to all corporations alike. In *Ottawa Gas Light and Coke Co. v. Downey*, 127 Ill. 201, it was expressly held, that under the statutes now in force the capital stock of gas companies is required to be assessed by the State Board of Equalization, and that such statutes, in distinguishing gas companies from purely manufacturing companies, and classing them with certain other corporations, and requiring their capital stock to be assessed by the State Board of Equalization, are not in violation of the State constitution. In this latter case, however, there was no consideration given to the matter of the constitutionality of the legislation in question, further than the statement that the decision of the court in *Coal Run Coal Co. v. Finlen* was directly in point, and decisive of the question presented.

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In the case now at bar, objection is taken to the conclusion reached by the court in the *Coal Run Coal Co. case*, and it is urged that the position taken by counsel in that case necessarily and improperly conceded that the tax referred to in the latter portion of section 1, of article 9, of the constitution, had reference to a property tax, and that the court, proceeding upon that assumption, held that the legislature might lawfully make the classification it made in the act, and that the difference in the manner of making the assessments upon the different corporations organized under the statute did not render the fourth division of section 3 of the Revenue act obnoxious to the second clause of section 1, of article 9, of the constitution, which clause authorizes the General Assembly to tax corporations owning and using franchises, in such manner as it shall direct, by general law, uniform as to the class upon which it operates.

The particular contention here insisted upon by appellant, as we understand it, is, that the capital stock tax provided for in the statute, and now in controversy, is essentially a property tax; that said second clause of said section 1 of the constitution does not authorize the imposition of a property tax, but, on the contrary thereof, merely permits taxation upon occupations,—and this, too, without any reference whatever to property or property values; that the right to impose a tax upon property must necessarily be referred to the first clause of the constitutional provision above quoted, and that since, by the amendment of 1879 to the statute providing for a tax upon the capital stock of corporations, all companies and associations organized for purely manufacturing purposes, or for printing, or publishing newspapers, or for improving and breeding stock, are expressly relieved from the burden of such a tax, that statute is in direct conflict with the rule of uniformity and universality established by the first clause of said section 1 of the constitution, which provides that every person and corporation shall pay a tax in proportion to the value of

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his, her or its property, and that the statute is therefore void, and the assessment upon the capital stock of appellant unauthorized.

It is unquestionably true that both the capital stock of a corporation and its franchise are corporate property, and it was only upon the ground they were property, and belonged to the corporation, that the capital stock taxes levied under the law of 1872 were sustained in *Porter et al. v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561, and numerous other cases. It must also be conceded, that if the right to levy a tax upon the capital stock and the franchise of a corporation, based upon valuation, is referable alone to the first clause of the constitutional provision under consideration, then the conclusion that the act, as amended in 1879, providing for their assessment by the State Board of Equalization, and excluding from the operation of the act certain classes of corporations organized for pecuniary profit, is obnoxious to the rule of uniformity and universality announced in said clause, is entirely legitimate. The claim, however, that the power to impose a tax such as that in question is given only in the first clause of said section of the constitution, and that no authority in that behalf is conferred by the second clause thereof, we do not concur in.

It is strenuously insisted that the second clause of said section 1 has reference only to a taxation upon occupations. It is true, that in the opinion of the court in the case of *Wiggins v. City of Chicago*, 68 Ill. 379, language is used, by way of argument, which seems to give color to the claim now made. But it is manifest, from an examination of the enumeration of particular vocations, etc., found in that clause, that such enumeration is not confined to occupations. In it are found insurance, telegraph and express interests or business, toll-bridges, ferries, and persons or corporations owning or using franchises and privileges. These matters can not accurately be regarded as occupations, or as connected with occupations,

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merely. Elements of property, and of property rights and values, enter into all of them. The first clause of the section lays down the general rule for the levying of taxes, which is "by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property," and also states the means by which such valuation is to be ascertained. The second clause begins with the word "but." That word is used in an exceptive or adversative sense, and means "on the contrary," or, "on the other hand."

In *Illinois Central Railroad Co. v. County of McLean*, 17 Ill. 291, the provisions of section 2, of article 9, of the constitution of 1848, were before the court, and they were almost identical with the provisions of said section 1 of the present constitution, except that the General Assembly was simply given power to tax the occupations therein mentioned, and persons using and exercising franchises, "in such manner as they shall, from time to time, direct," and there was no requirement, as now, that this should be done by general law, and that the taxation should be uniform as to the class upon which it operates. It was there held, that the first clause of the section prescribed the general rule,—that of uniformity and proportion, upon the basis of the actual appraised valuation of all property, which was to govern in the levying of taxes. But it was also held that this rule was not a universal and inflexible one; that there were exceptions to it; that the second clause of the section contained an exception, and that the design of the exception was, to enable the legislature to make the burthen of taxation proportionate, by applying a different rule to the occupations enumerated in said clause, to toll-bridges, to ferries, and to corporations exercising franchises and privileges, from that applied to individuals generally. It was there said: "Power, then, to make a flexible rule, became indispensable to reach and remedy an inequality inseparable from the nature of these circumstances, and irremediable by a uniform and proportionate rule, assessed on

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actual appraisements of visible property. Therefore, this general power to tax these, which, when exercised generally upon all or specially upon one corporation, may well commute, estimate, include and compound, within the rule of assessment, whatever of real or personal property the individual or corporation may use in the calling or with the franchise." And it was further said: "The power, then, to fix upon some other rule * * * leaves the mode of assessment and valuation to the wisdom of the General Assembly." It must be presumed that when the present constitution was adopted, it was with full knowledge of the interpretation that had been placed by this court upon the language incorporated therein, which was taken from the prior constitution.

In *Porter et al. v. Rockford, Rock Island and St. Louis Railroad Co.* 76 Ill. 561, the decision was in line with that made in the *McLean County case*, and proceeded upon the assumption that the power to impose taxes, under the act of 1872, upon capital stock, including franchise, was derived from the second clause of said section 1 of the constitution of 1870, and it was held, that the present constitution does not require that the legislature, in providing for the taxation of corporations, shall designate the precise amount which each corporation shall pay, and that this shall be the same on each corporation, without regard to the value of the franchise or the privileges enjoyed, nor that such taxation shall be of like character with that which may be imposed on the persons pursuing the particular vocations named; and further held, that it was discretionary with the legislature to determine whether corporations should be taxed only on their tangible property, on the amount of their capital stock paid in, on the amount of their gross receipts, or on the value of their tangible property and on the fair cash value of their capital stock, including franchise, over and above the assessed value of their tangible property, and that the only limitations upon the legislative power in that regard were, that such taxation should

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be directed by general law, and that such law should be uniform as to the class upon which it operates.

Our conclusion in respect to the first contention of appellant is, that its claim in that regard is not well founded; that the decisions of this court in *Coal Run Coal Co. v. Finlen*, *supra*, and in *Ottawa Gas Light and Coke Co. v. Downey*, *supra*, were right, both upon principle and upon authority; and that as the capital stock tax complained of was directed by a general law uniform as to the class upon which it operated, it is not obnoxious to any constitutional provision.

Second—The remaining contention of appellant is, that the assessment upon its capital was fraudulently made by the State Board of Equalization.

It appears from the allegations in the bill, that the total equalized assessment for the year 1885, upon its tangible property, was \$4697, and that the taxes extended thereon amounted to \$202.42, and that the board of equalization assessed its capital stock at the further sum of \$6712, and that further taxes, amounting to \$319.18, have been extended thereon. It is averred in the bill, that "said capital stock represents and has no other or greater value than that of said tangible property, already taxed." These further allegations are found in the bill of complaint: "That your orator, in 1885, returned to said board of equalization, in pursuance of the statute in that behalf, the amount, value and assessment of the tangible property of your orator, and also the amount and value of the capital stock of your orator, in which return your orator stated that its said capital stock had no other or further value than that of your orator's said tangible property, which had already been assessed, as aforesaid; and said board, without any knowledge or information in the premises other than that furnished, as aforesaid, by your orator, and, as your orator is informed and believes, without any attempt to obtain other or further information as to the value of your orator's alleged capital stock, and in complete ignorance of the same,

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save the information furnished, as aforesaid, by your orator, and with the intent to impose said burden upon your orator regardless of the true value of said alleged capital stock, fraudulently ordered said assessment of \$6712 against and upon the capital stock of your orator."

The statement that the action of the board was fraudulent is the mere statement of the conclusion or opinion of the pleader. It devolves upon the party claiming fraud, to state the facts relied upon as constituting it; and where the facts alleged do not necessarily amount to fraud, a demurrer to the bill does not admit fraud. The facts averred in the bill which it is claimed show fraud on the part of the board of equalization are to be taken most strongly against the pleader. It is to be noted that the bill does not disclose what was shown in the return made by the corporation in respect to the total amount of all its indebtedness, excluding indebtedness for current expenses. In the absence of any statement of what was shown by the return relative to such indebtedness, it may well be presumed that the showing in that regard was such as fully to justify the assessment that was made upon capital stock.

It has been decided by this court in very numerous cases, that the State Board of Equalization is not concluded by the valuation placed upon the property of a corporation by its officers, and that it is not essential that it should first hear evidence in fixing the taxable value of property, or in changing the valuation returned by the corporation. The law gives to the board the power, and imposes upon it the duty, of ascertaining and determining the value, and in fixing it the members of the board may act upon their own knowledge and judgment. *Porter v. Rockford, Rock Island and St. Louis Railroad Co. supra*; *Republic Life Ins. Co. v. Pollak*, 75 Ill. 292; *Pacific Hotel Co. v. Lieb*, 83 id. 602; *St. Louis, Vandalia and Terre Haute Railroad Co. v. Surrell*, 88 id. 535; *Railroad and Coal Co. v. Stookey*, 122 id. 358.

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In *Connecting Ry. Co. v. The People*, 119 Ill. 182, it was said: "Obviously, the fraud which may be urged against the assessment must, in general terms, have either consisted in a willful disregard, by the members of the board, of a known duty, for the purpose of producing a result which could not otherwise have been produced, or in their denying or preventing the tax-payer from doing something that he might lawfully do, and, but for being denied and prevented by them, would have done, which would or might have had the effect to have caused a lower valuation of the property to be made." We think it manifest that no such case is shown by the facts stated in the bill of complaint as necessarily amounted to a fraud under either branch of the rule above enunciated, and that the interposition of the demurrer was not an admission that there was fraud in making the assessment, on the part of the board of equalization.

We find no error in the record, and the decree of the circuit court is affirmed.

Decree affirmed.

WILLIAM YOUNG

v.

THE COMMISSIONERS OF HIGHWAYS OF MAQUON TOWNSHIP.

Filed at Ottawa October 31, 1890.

1. HIGHWAYS—mode of improving them—discretion of commissioners. The manner of improving highways is left principally to the wise discretion of the commissioners of highways; and in the exercise of the duties imposed on them by law they can not be interfered with, unless they invade some private right of a citizen.

2. SAME—drainage of highways—servient heritages protected. Where commissioners of highways undertake to drain a public highway, they possess the same rights and are governed by the same rules as adjoining land owners who may undertake to drain their own lands, except where they may proceed under the eminent domain laws of the State.

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3. Commissioners of highways, in draining a public road, have no right to divert the water from its natural course and turn it upon the land of another; and if they attempt to do so they may be enjoined by a court of equity, at the suit of the owner of the land on which the water is proposed to be turned.

4. The commissioners have no right or power to collect and carry a quantity of water along a highway which would naturally drain off in another direction, and discharge such accumulated water on the farm of an adjoining land owner; nor have they the right to divert water from its regular channel, or place where it would voluntarily flow off, and carry it along the line of the highway in ditches, for such a distance as they may desire, and then discharge it upon the farm of an individual.

5. *SURFACE WATERS—dominant and servient heritage.* The owner of the dominant heritage, or higher tract of land, has the right to have the surface water falling or coming naturally upon his premises, pass off through the natural drains, upon and over the lower or servient lands; and the owner of the dominant heritage may, by ditches or drains, drain his own land into the natural and usual channel, even if the quantity of water thrown upon the servient heritage is thereby increased.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Knox county; the Hon. A. A. SMITH, Judge, presiding.

This was a bill in equity, brought by William Young, to enjoin the commissioners of highways of the town of Maquon, in Knox county, from digging a ditch along the south side of the highway adjoining the lands of the complainant, extending from what is known as the "east Harper drain" to the "west Harper drain," a distance of about forty-five rods, and to restrain them from diverting surface waters from their natural channel, and discharging the same, through the proposed ditch, upon the complainant's lands.

In the original bill complainant alleged that he owned four hundred and forty acres of land on the north side of section 23, Maquon township; that the commissioners of highways propose to cut, and, in fact, have partly cut, a ditch four feet wide and eight feet deep on the road running from Spoon river through

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Salem township, in said county, said road running parallel with said four hundred and forty acres of land owned by your orator, which said ditch, if made, will drain at least one-third of Salem township, and throw upon your orator's land said accumulated water, taking the same out of its natural course, and inflicting upon your orator's land an unnecessary burden, and causing to his said premises, by reason of said unnatural flow of water, a flooding of said premises, and thereby an irreparable damage thereto. In an amended bill it was alleged that Robert Harper owns and occupies as a farm the south-west quarter of section 14, lying immediately north of the west part of your orator's land; that between the said land of said Harper and your orator runs a public highway, extending directly east past your orator's land and through Salem township; that no water is precipitated on the surface of the ground from said public highway, nor from the land of said Harper, across the public highway aforesaid, upon the land of your orator, on the surface; that a drain or dry slough, in which the water does not run upon the surface of the ground, runs from the roadway aforesaid, at the north or near the center of your orator's land, in a semi-circular direction, to the northward over the land of said Harper, and running north of Harper's house, returning across the highway eight rods from the north-west corner of your orator's land, thence southward over your orator's land; that said slough, in which no water ran on the surface, has been thoroughly tiled by Harper and your orator. It is also alleged that the public highway has been so graded and ditched with deep ditches that the surface water in times of rains and freshets, from the east line of Maquon township, being one mile east of your orator's north-east corner, is carried along said highway to your orator's land, while naturally a large portion of said surface water passed off in other directions over the adjacent lands; that said ditches are continued westward by the side of your orator's land, carrying said surface water so diverted from its natural course,

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along said highway ; that prior to the month of May or June last, the water in said ditches was, near the center of the north-east quarter of your orator's land, turned through a culvert or bridge across the public highway, to the north, and thence into a slough running northward and away from your orator's land ; that in the month of May or June last, the ditch on the south side of the said public highway, and by said last mentioned bridge, was deepened to about a foot lower than the bottom of the opening under the road under said bridge, so that the water either had, in times of rains or freshets, to stand in the ditch on the road, or make its way in some other direction ; that said ditch on the south side of the said highway, being the north side of your orator's land, extends along to where said highway commissioners are intending to make the deep ditch complained of, and that by excavating about a foot in depth for about fifteen rods, said water would all run along said highway to said proposed ditch complained of, and not through said last mentioned bridge, which, since June last up to since the commencing of this suit, has remained with the bottom nearly a foot higher than the bottom of said ditch ; that said highway commissioners intended and proposed, after they had excavated the deep ditch complained of, to deepen said ditch, when it was only a foot higher than the bottom of the ditch at the south end of said last mentioned bridge, so that all the water so diverted as aforesaid, and brought from the east line of Maquon township, would, through said deep ditch, be precipitated in time of rain upon your orator's land at the west end of said deep ditch, in a body, when, except in time of extraordinary freshet, no water runs upon the surface of your orator's land ; that the natural surface water from the east side of your orator's land, and the land lying east and north of the same, runs away gradually, forming no stream or body of water that interferes with agricultural pursuits or the farming of your orator's land ; that the commissioners of Maquon township propose and have partially cut a deep ditch

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for the purpose of collecting the surface water from the north and east parts of your orator's land, cutting the ditch several feet in depth through the high land between your orator's and said Harper's land, and discharging the said collected surface water in an unnatural body upon the land of your orator at one place where no water now runs upon the surface. It is also alleged that the digging of the ditch and the discharge of the water will work irreparable injury to orator's lands.

The commissioners of highways put in an answer to the bill, in which they deny that the ditch, as made and as proposed to be made, will drain one-third of Salem township, or that it will throw upon complainant's land any increased or unnatural accumulation of water, or cause irreparable damage to complainant's land, or inflict any unnecessary burden thereon; aver that the ditch is only about one hundred yards in length, and that in its deepest place, when completed, it will not exceed three and one-half feet; deny that said proposed ditch will drain any land or the grade ditch east of the old orchard on complainant's land, which is about sixty yards west of the culvert across said highway, described in said amended bill; deny that they intend said proposed ditch to drain said grade ditch, which now conveys the surface water northward across the highway through said culvert or bridge, or in any way to interfere with such ditch and drainage as they now are; deny that this ditch was dug or intended to connect with or change the surface water northward across the highway, or eastward, in any way to interfere with or change the drainage from what it was before the said ditch was dug, or from what the drainage had theretofore, in a state of nature, been; that the ditch was dug in the performance of their duties as commissioners of highways in said township, and because, in their best judgment, the same was necessary to the proper care and improvement of such highway at that place, and for no other or different reason; deny that they have or intend to enter, with or without force, any lands of complain-

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ant to dig any ditch, or for any purpose whatever; deny that the ditch, when dug and completed as contemplated, will cause irreparable or any injury whatever to complainant, as he has alleged, and deny that complainant, upon the case made by his said original and amended bills, was or is entitled to any relief whatever.

A replication having been filed, the cause was heard on the pleadings and evidence, and a decree rendered in favor of complainant. On appeal to the Appellate Court the decree was reversed, and the cause remanded, with directions to dismiss the bill. To reverse the judgment of the Appellate Court the complainant appealed.

Mr. G. W. THOMPSON, and Mr. FLETCHER CARNEY, for the appellant:

The same rules of law are to be applied to road drainage as to farm drainage. *Nevins v. Peoria*, 41 Ill. 502; *Tearney v. Smith*, 86 id. 391; *Pekin v. Brereton*, 67 id. 477.

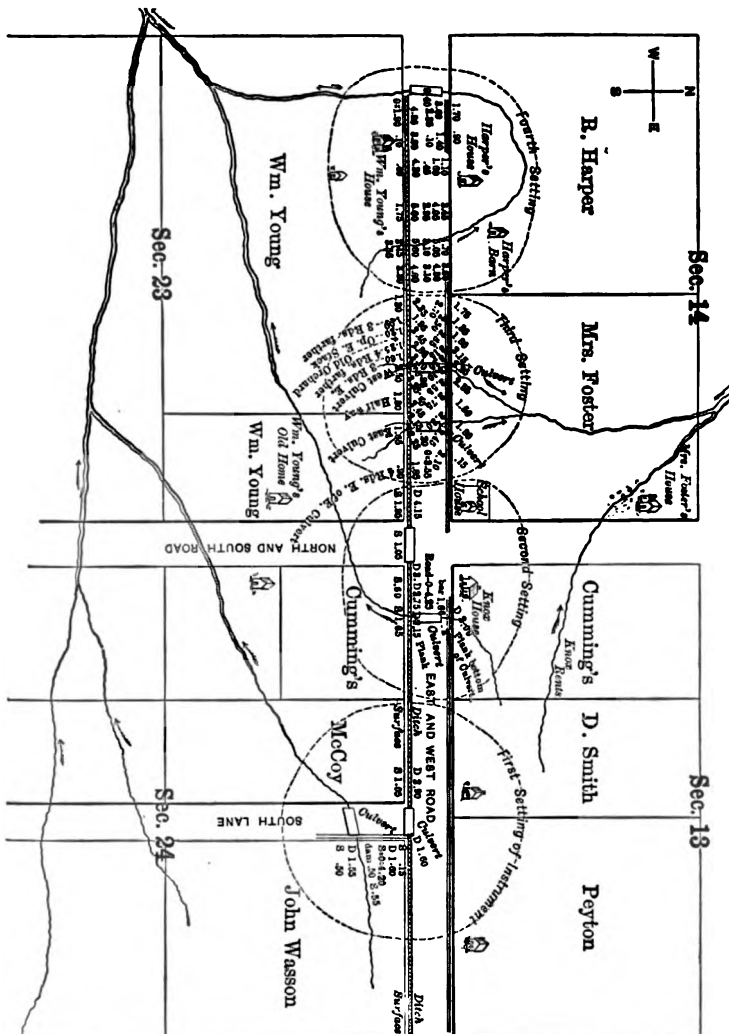
While the owner of lower lands shall receive all water that naturally flows from the next higher lands, the owner of the higher lands may not open or remove natural barriers, and let on to such lower lands water which would not otherwise naturally flow in that direction. *Anderson v. Henderson*, 124 Ill. 164; *Groff v. Ankenbrandt*, id. 51; *Peck v. Herrington*, 109 id. 611; *Gormley v. Sanford*, 52 id. 158.

MESSRS. WILLIAMS, LAWRENCE & BANCROFT, and Mr. T. L. MCGIRR, for the appellee:

The bill is without equity, on its face. The law permits the owner of the dominant heritage to draw off or turn either surface or flowing water through artificial channels on his own land, upon that of another, at a point where such water "had been wont to flow." *Palmer v. O'Donnell*, 15 Bradw. 324; *Peck v. Herrington*, 109 Ill. 611; *Dayton v. Drainage Comrs.* 128 id. 271.

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PER CURIAM: On the hearing a plat was put in evidence, which shows the road in controversy, the owners of lands along the line of the road, the location of the ditch in question, and tending to show the direction in which the surface water naturally flows from the line of the highway. The plat was marked "Exhibit A," and is as follows:



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The road shown by the plat is two miles long, running from the south-west corner of the north-west quarter of section 14, and the north-west corner of the north-west quarter of section 23, in Maquon township, to the west line of Salem township. In the spring or early part of the summer of 1887 the commissioners of highways of Maquon township concluded to thoroughly grade and improve the road, and the work was allotted to Arthur Miller, one of the commissioners. In June the work was commenced at the south-west corner of section 14, a point known as the "Harper corners." Miller testified that he began work ninety rods west of Harper's house, graded at the four corners, did some work at the west drain, then scraped the hill between the Harper drains, and then, further east, did work at the Foster culverts, putting dirt between them, and from there to the school house, and from there east, finished the grading as it was intended to be. Along the line of the road the ground was plowed on each side of the road, and the dirt was used to raise the bed of the track, leaving the ditches caused by the excavation to carry off the water along the line of the road. It will be observed that between the east and west Harper drains there is a rise of land or a hill, which is some five feet higher at the highest point on the south side of the road than the natural soil at the east drain. In grading the line of road, in June, this hill or rise was not removed, but remained substantially as it originally existed until about the 5th day of December, when the commissioners commenced cutting a ditch on the south side of the road, to carry the water which might accumulate at the east Harper drain to the west drain; and the evidence shows that it would require a ditch five and six-tenths feet deep at the deepest point, to let the water pass through this rise or hill, in order to drain the east drain and carry the water along the road. The completion of this work complainant sought to enjoin by the bill.

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In order to determine whether the complainant has a standing in a court of equity, it will be necessary to go back and examine the evidence in reference to the natural flow of water along the line of the highway. The manner in which the public highways may be improved must necessarily be left, to a great extent, to the mere discretion of the commissioners of highways, and in the exercise of the duties enjoined upon them by law they can not be interfered with, unless they invade some private right of a citizen.

Upon looking into the evidence it will be found that there is no substantial conflict in regard to the natural flow of the surface water on and along the highway. We will, however, refer to the evidence of Prof. Churchill, who does not reside in the neighborhood, and has no feeling or bias in regard to the matters in dispute. The witness made an examination, as he says, to ascertain the drainage of the lands in reference to the road running east and west. He testified: "The road has a gradual fall from Salem township line to Young's west line. There are two drains that cross the road from the north to the south, one in Wasson's place and one at the Cummings place, with natural drainage from north to south, with a fall to the west. In section 13, from a line sixty to eighty rods north of the road, the water naturally flows to the north,—that is, the divide, from which the water runs north and south, is about that far north of the road. Between the school house and the old orchard the land on the south side of the road is higher, and the water makes across the road from section 23 north on to section 14, the natural drainage there being to the north and east on to section 14,—from Mr. Young's land on to Mrs. Foster's land,—through two culverts. Then further west, near Mr. Harper's house, the natural drainage is from south to north across the road in front of Harper's east barn, then around to the north of his house, and back across the road on to the west part of section 23, west of Young's new house."

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From the evidence of this witness, who is corroborated by a number of others, and contradicted by none, it appears that at the east end of the highway the water naturally runs south-west from the highway, crossing the south lane twenty-five rods south, as shown by the plat. About one-half mile further west the water crosses the road again, running south-west. A little further west, at the two Foster drains, as shown on the map, the water crosses the road from south to north, and runs off in a north and westerly direction over the Foster land. Less than a half-mile further west the water again crosses the road from the south to the north at the east Harper drain; and again, near the west part of the road, the water crosses the highway, running south, at what is called the west Harper drain. It is thus plain that there is no natural flow of water at any point from east to west along the highway, but, on the other hand, at six different points in the two mile line of road, the water, when allowed to run as nature had provided it should, will cross the road and run off in a north or south direction. Upon looking at the plat, in connection with the evidence of the witnesses, these six points where the water crosses the road are the following: First, at the south lane, running south-west; second, at the Cummings drain, running south-west; third and fourth, at the two Foster drains, running north; fifth, at the east Harper drain, running north; sixth, at the west Harper drain, running south. Has the water been diverted from its natural channel, and forced by the commissioners to run in another direction?

As to the south lane, Churchill, in his evidence, says: "Without the ditch," (meaning the ditch twenty-five rods long on the east side of the south lane, constructed to run the water north into the highway,) "and left alone, the water would flow south from the east and west roads, across the McCoy land, to the south and south-west." As to the water at the Cummings drain the witness said: "At the Cummings land there is a drain which should take the water from section 13 across the

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east and west road on to section 24, to the south-west, and across the north and south road, following the natural drainage; but the ditch on the south side of the east and west road, as now constructed, is sufficient to carry this water, which should naturally run upon and across the Cummings forty, west to the culvert in the east and west road ditch across the north and south road, so that the water runs west there. This Cummings drain is twelve or fourteen rods from the intersection of the roads. The ditch is about two feet deep west of this culvert, where these roads cross each other. A ditch a trifle over a foot deep would carry the water from the Cummings culvert west to the intersection of the two roads, and the ditch is almost two feet deep." At the intersection of the two roads the witness finds the ditch two feet deep, and at that point he says the water which would naturally run across the Cummings forty runs west along the east and west road towards Harper's. At the Foster drains, where the water naturally runs north over the Foster land, the ditch on the south side of the road was made some nine inches deep, and the center of the road is about two and three-tenths feet above the bottom of the ditch, so that the water coming from the Cummings drain down the road was prevented from going north over the Foster land. However, it appears from the evidence, a short distance west of the west Foster drain there is a rise in the land at or near a point called "old orchard." There the ditch is from eight to ten inches deep on the south side of the road, but, according to Churchill's evidence, the bottom of the ditch at this point is six inches higher than the bottom of the ditch at the west Foster culvert, and he says that the ditch would not have to be lowered more than six inches to enable the water to run west past the old orchard, and into the east Harper drain. That it was the intention to run the water west along the entire line of road is, however, manifest from the evidence of Miller and B. F. Foster.

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In speaking of the water at the south lane and at the Cummings drain, commissioner Miller, on his cross-examination, said: "I knew of the complaints about the water being turned, at the time I changed this culvert at the south lane. We carried the water west, instead of allowing it to run across Cummings, because Cummings objected. He said he would spend \$300 if we run it across him. That is where the water belonged." From this evidence it appears that Cummings would not allow the water coming from the east, out of its natural course, to be turned on to him; and when the Foster drains are reached, still further west, we find the same objection, and to avoid trouble the water had to be carried on further west.

B. F. Foster testified: "I reside about one hundred and twenty rods north of the school house, on the south-east quarter of section 14, on which my mother owns the land along this east and west road, opposite Young's, from the school house west to the old orchard. I had a talk with Mr. Miller, one of the road commissioners, in May, 1887, the substance of which was: Mr. Miller asked me if mother was objecting to them draining the water there, and I told him if they turned this water that did not belong there, on us, I thought there would be objections, and he said it was not the intention to turn the water which did not belong there, on mother's land,—that he intended to run these ditches on each side of the road grade, clear to the Salem township line, and run this water west to the drain west of Harper's."

After passing the Foster drains, the next point reached is the east Harper drain. Here the culvert had been removed, and the water could not pass over on Harper's land. If an effort had been made to turn the water coming down the road from the east, upon Harper, doubtless the same objection would have been made that had been interposed by Mrs. Foster and Cummings. But the plan adopted did not contemplate turning the water on Harper's land, but the understanding

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was, to cut a ditch from the east to the west Harper drain, along the south side of the road, of sufficient capacity to carry the water coming down the road from the east to the west Harper drain. There the water was to be deposited, regardless of consequences.

From an examination of the evidence but one conclusion can be reached, and that is, that the commissioners of highways have diverted the water from its natural course, and turned it upon the land of complainant. Does the law authorize this action? The commissioners of highways, where they undertake to drain a public highway, possess the same rights, and are to be governed by the same rules, as adjoining land owners who may undertake to drain their own lands, except where they may be proceeding under the eminent domain laws of the State.

In *Peck v. Herrington*, 109 Ill. 611, we had occasion to consider the rights and duties of adjoining land owners, and the rules that should govern them in draining their lands, and among other things it was there held: "The owner of the dominant heritage or higher tract of land has the right to have the surface water falling or coming naturally upon his premises, pass off the same, through the natural drains, upon and over the lower or servient lands; and the owner of the dominant heritage may, by ditches or drains, drain his own land into the natural and usual channel, even if the quantity of water thrown upon the servient heritage is thereby increased."

Under the rule established in this case, it seems plain that where water accumulating in a particular part of a highway will naturally run off in a certain channel or water-way, all that portion of the highway which lies in such a position as to naturally drain in that direction may be drained in such channel, although the flow of water may be increased. But the commissioners have no right or power to collect and carry a quantity of water along the highway which would naturally

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drain off in another direction, and discharge such accumulated water on the farm of an adjoining land owner. Nor have the commissioners the right to divert water from its regular channel, or place where it would naturally flow off, and carry it along the line of the highway, in ditches, for such a distance as they may desire or think proper, and then discharge that water upon the farm of a land owner. This would be imposing a burden upon the land owner, which the law will not tolerate. Cases may arise where the commissioners might, no doubt, if they saw proper, divert the water along the highway, from its natural flow, and carry it along the line of road, to be discharged into some large stream of water which might cross the highway. In the case under consideration, had there been a large stream of water crossing the highway where the commissioners proposed to discharge the water, doubtless they might, had they thought it for the best interests of the district, have conducted the water from the Wasson land and other points, along the line of the highway, and discharged it into such stream, as such a course would have resulted in no damage to the adjoining land owners. But such was not this case. Here, the water is diverted from its natural channel, carried along the line of the highway for a long distance, and then discharged on the highway in such manner as to spread over the lands of the complainant. The land owner can not be subjected to a burden of this character without a remedy.

We think the judgment of the Appellate Court was erroneous. It will be reversed, and the decree of the circuit court will be affirmed.

Judgment reversed.

THE PENN MUTUAL LIFE INSURANCE COMPANY

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74a 146

v.

ANNA C. KEACH.

Filed at Springfield November 1, 1890.

1. INSTRUCTIONS—*technical inaccuracies—looking to the series.* Where, taking all the instructions as a series, it appears that the law has been fully and fairly given, the judgment will not be reversed for mere technical inaccuracies in some of the instructions given, not calculated to mislead, nor for the refusal of instructions asked which were not required, in view of those given.

2. PRACTICE—*special questions to jury.* There is no error in refusing to submit special questions of fact to the jury for answer, when such answers, if returned, would settle nothing.

WRIT OF ERROR to the Appellate Court for the Third District;—heard in that court on appeal from the Circuit Court of Greene county; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Mr. H. H. C. MILLER, and Mr. JAMES R. WARD, for the plaintiff in error.

Mr. HENRY C. WITHERS, and Messrs. PALMER & SHUTT, for the defendant in error.

Per CURIAM: This was an action brought by Anna C. Keach, against the Penn Mutual Life Insurance Company, to recover the amount of a policy of insurance on the life of her husband, John R. Keach. The plaintiff set out the policy in the declaration, and in addition to the usual averments the declaration contained the following: "And the plaintiff avers that the said John R. Keach, during his lifetime, at all times complied, on his part, with all the covenants and conditions imposed upon him by the terms and provisions of said policy, and paid all premiums required to be paid by him except the premium of

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\$82.90 becoming due May 5, A. D. 1888; and the plaintiff avers that the payment of said premium, in cash, on the 5th day of May, A. D. 1888, was waived by said company, and postponed to a period of time beyond the date of the death of the said John R. Keach, and at the death of said John R. Keach the said policy was in full force."

The assured died on the 27th day of July, 1888. The policy was dated November 5, 1885, for \$5000, and was issued upon the following among other conditions:

"*First*—The payment to the company, at its said home office, of the eighty-two and ninety one-hundredths dollars (\$82 $\frac{90}{100}$) at the date hereof, and of the quarter-annual premium of eighty-two and ninety one-hundredths dollars (\$82 $\frac{90}{100}$) at or before three o'clock P. M., on the 5th day of November, February, May and August in every year during the continuance of this contract."

The premium due May 5, 1888, was not paid, and in order to recover it became necessary to prove, on the trial, that prompt payment was waived and postponed, as alleged in the declaration.

Whether the payment of the premium of May 5 was waived and postponed was a question of fact, upon which much evidence was introduced by the respective parties on the trial in the circuit court. Upon the evidence introduced on the trial the jury found in favor of the plaintiff, and the court rendered judgment on the verdict. On appeal to the Appellate Court the facts were reviewed, and the judgment of the circuit court was affirmed. That judgment is conclusive on controverted questions of fact. Those questions, however, have been again discussed in the argument filed in this court, but as we do not review controverted questions of fact, that branch of the argument will not be considered. It is not claimed that there was any substantial error in the ruling of the circuit court in the admission or exclusion of evidence, nor do we find any error in that regard in the record. The only question, therefore, to

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be considered here is, whether the circuit court ruled correctly in giving and refusing instructions.

The only controverted question of any importance on the trial was, whether the defendant company had waived and postponed the payment of the premium falling due, by the terms of the policy, May 5, 1888, and but few instructions were required to place this question in a proper light before the jury. The court, however, gave nine instructions on behalf of the plaintiff, and five on behalf of the defendant. We have carefully examined all the instructions, and, taken as a series, we think the law involved in the case was fully and fairly given to the jury. In those given for the plaintiff, technical inaccuracies may be found; but they contain nothing calculated to mislead the jury or prejudice the rights of the defendant. The court refused three instructions asked by the defendant, but the law was so fully stated on behalf of defendant in the instructions given, particularly in No. 2, that the giving of other instructions was not required. Nor was the refusal of the instructions error which should lead to a reversal of the judgment.

Complaint is also made that the court refused to instruct the jury to return answers to five special interrogatories or questions submitted by the defendant. Had answers been returned by the jury to the questions propounded, such answers, of themselves, would have settled nothing, and under the rule in *Chicago and Northwestern Ry. Co. v. Dunleavy*, 129 Ill. 132, the court did not err in refusing to submit the questions to the jury.

The judgment of the Appellate Court will be affirmed.

Judgment affirmed.

Syllabus.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY

v.

WILLIAM CLOUGH.

Filed at Ottawa October 31, 1890—Rehearing denied May 7, 1891.

1. **NEGLIGENCE**—*injury at railway crossing—duty of flagman to give timely warning—right of the public to rely thereon.* It is the duty of a flagman stationed at a public highway crossing by a railway company, to know and give timely warning of the near approach of trains, and the public will have a right to rely upon a reasonable performance of that duty.

2. **SAME**—*flagman improperly signaling to cross.* It is gross negligence for the flagman of a railway company at a street crossing to signal to a traveler to drive his team and wagon upon the railway track when he knows that a passenger train is approaching the crossing without blowing a whistle or ringing a bell, and the view of the approaching train is obstructed by cars left on the side-tracks, and by buildings.

3. A count in a declaration in an action against a railway company, for negligence, resulting in a personal injury at a highway crossing, alleged an obstruction of the view from the highway by cars and buildings, and that the flagman of the company, well knowing the near approach of a train, recklessly, negligently and willfully beckoned to the plaintiff to drive upon the tracks, etc. There was proof on the trial, not only that the flagman beckoned the plaintiff to cross over the tracks, but that he did this negligently and recklessly, when he knew the train was coming: *Held*, that there was sufficient evidence to authorize an instruction based upon the negligence charged in the count.

4. **SAME**—*signal by flagman not to cross—but not in proper time—other precautions neglected—care required of persons seeking to cross a railway track.* The mere fact that a party injured by a collision at a highway crossing was signaled by a flagman stationed there not to cross the tracks, will not relieve the railway company from liability for neglecting to lower the gates on the approach of a train, and to sound a bell or whistle, and in running its train at a rate of speed prohibited by an ordinance, if the signal to stop is not given in time for the party injured to avoid the injury by the exercise of ordinary care. *Any* warning in such a case is not sufficient to prevent a recovery.

5. In an action against a railway company the defendant asked this instruction: "If the jury believe, from the evidence, that the flagman on the crossing did not flag the plaintiff to cross the tracks at all, and

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140 122
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144 587

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54a 277

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61a 364

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68a 285

134 586
70a 424

134 586
71a 458

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74a 425
76a 346
78a 368

134 586
206 14827

134 586
110a 1492

134 586
210 14288

111a 34
112a 1467

134 586
114a 1504

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if the jury further believe, from the evidence, that he signaled the plaintiff not to cross, then the jury are instructed, as a matter of law, that the plaintiff is not entitled to recover in this case, even if the jury should also find, from the evidence, that the gates were not lowered on the crossing, that no bell was rung or whistle sounded, and that the train was moving at a rate of speed in excess of that prescribed by the ordinances of the town." The court modified the same by inserting after the words "not to cross," the words, "in time for the plaintiff, by the exercise of reasonable care, to have avoided the injury:" *Held*, that the modification was manifestly proper.

6. In such case, the defendant asked the court to instruct the jury, that if the witness, P., attempted to prevent the plaintiff from crossing, in time to avoid the injury, then there could be no recovery, which was refused as asked: *Held*, properly refused, as ignoring the question whether the plaintiff had notice or knowledge of such attempt.

7. In the same case, the defendant asked this instruction: "The jury are instructed, as a matter of law, that under the evidence in this case the plaintiff is not entitled to recover, even if the jury believe, from the evidence, that the flagman signaled him to come across the track, and if the jury also believe, from the evidence, that no bell was rung or whistle sounded, provided the jury believe, from the evidence, that the plaintiff could, by looking and listening, have discovered the approach of the train in season to avoid the accident complained of," which was refused as asked: *Held*, properly refused, as it deprived the plaintiff, as matter of law and wholly regardless of the surrounding circumstances, of the right to place any reliance upon the signals given by the flagman.

8. The court modified the instruction by striking out all after the word "plaintiff," where it last occurred, and substituting therefor the words, "did not exercise ordinary and reasonable care, under all the circumstances as shown by the evidence, to discover the approach of the train and prevent being injured:" *Held*, that the instruction, as modified, expressed the law substantially as stated by this court in prior cases.

9. Where a public street was crossed by two main tracks and twenty side-tracks of a railway company, and a flagman was stationed at such crossing to give warning of danger to any one about to cross the tracks, and plaintiff was injured by a collision in attempting to pass over the railroad tracks, it was *held*, on the trial of an action by him against the company, no error to refuse to instruct the jury that the plaintiff was under an obligation, while driving across the tracks, before driving over any particular track, to look and listen for a train that might be approaching upon any of the tracks, and that the obligation which the law imposed upon him would not be satisfied by looking and listening before driving upon the first track, but that the exercise of such care

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and caution on his part should have existed while driving over all of the tracks.

10. *SAME—duty of passenger to seek a safer crossing.* The mere fact that by going several blocks out of his direct course a party might have crossed a railroad at a place where there were fewer tracks and the crossing was safer, which he fails to do, does not necessarily, and as a matter of law, charge him with a want of ordinary care. This case is distinguished from *City of Centralia v. Krouse*, 64 Ill. 19.

11. It is not *per se* negligence in a party to attempt to pass over railroad tracks crossing a public street generally traveled, and guarded by a watch tower, and by gates across the street on both sides of the tracks, when a watchman is also stationed there, both night and day, to warn persons of danger. To hold this negligence would be tantamount to closing the street as a public highway.

12. *EVIDENCE—quantum of proof required.* On the trial of an action against a railway company, to recover for a personal injury while in the act of crossing the railway track in a street, the defendant asked the court to instruct the jury, that if the evidence was evenly balanced, or if it preponderated, *as to a material point*, in favor of the defendant, the finding should be not guilty, which the court modified by striking out the words "as to a material point," and then gave it: *Held*, that under the facts the instruction was properly refused, as requiring too much proof on the part of the plaintiff.

13. *PLEADING AND EVIDENCE—recovery upon one or more of several counts.* Where several different grounds of action as acts of negligence are alleged in several counts, the plaintiff will be entitled to recover if he proves, by a preponderance of the evidence, either ground of action. The burden is not on him to prove, by a preponderance of evidence, as a condition precedent to the right of recovery, each and all of the material acts of negligence in each and all the counts.

14. *PRACTICE—specific objection—variance.* If there is a variance between the allegations of the plaintiff's declaration and the proofs, the objection should be made in the trial court, so as to afford an opportunity to amend.

15. *SAME—objections to particular counts.* Instructions directing the jury to disregard the several counts in a declaration which fail to call the attention of either court or jury to any supposed defects of either of such counts, are properly refused.

16. *SAME—time to object—defects in declaration.* If a declaration, or count thereof, in an action for negligence, is defective, in failing to aver due care on the part of the plaintiff, the defendant should demur, or call the attention of the court to it in some other way, before final judgment, so as to afford an opportunity to obviate the defect by amendment. Such defects are cured by the verdict.

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17. *SAME—special questions to jury.* There is no error in refusing to submit to the jury special questions of fact which are merely of an evidentiary character.

18. *NEW TRIAL—newly discovered evidence.* Newly discovered evidence which is merely cumulative and inconclusive is no ground for a new trial.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Superior Court of Cook county; the Hon. KIRK HAWES, Judge, presiding.

Mr. THOMAS S. WRIGHT, and Mr. ROBERT MATHER, for the appellant.

Mr. JOSEPH S. KENNARD, for the appellee.

Mr. JUSTICE BAKER delivered the opinion of the Court:

In this action on the case for personal injuries, William Clough, the appellee, had verdict and judgment in the Superior Court of Cook county, against the appellant corporation, for \$5000 damages, and that judgment was affirmed in the Appellate Court for the First District. A further appeal brings the record to this court. Very numerous grounds are urged for the reversal of the judgment, and the most important of these will be briefly considered.

Between six and seven o'clock in the evening of June 5, 1886, appellee, a butcher, was driving a horse and wagon and delivering meats to his customers in the town of Lake, in Cook county. He was going west on Forty-third street, a public highway in said town, and started to cross the railroad tracks of appellant and of the Lake Shore and Michigan Southern Railroad Company, which, at the place in question, were twenty-two in number, ran north and south, and intersected the street at right angles. To the east and west of the tracks there were gates which were operated from a tower which stood about midway between the two gates. These gates were open.

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There were two main tracks, called, respectively, the "in main track" and the "out main track," and east of these were eleven side-tracks and west of them nine side-tracks, and the eleven switch-tracks on the east were blocked with cars both north and south of the street. A train of the appellant company, consisting of an engine and five or six passenger cars, approached the crossing from the north, on the "out main track." Appellee drove at a brisk trot until he reached a point just east of the "in main track," when he tried to check his horse, but was unable to do so, and the engine struck his wagon, and he was thrown out and received serious injuries.

The declaration consisted of six counts. The first charged negligence in the management of the train, and wrongful conduct of the flagman stationed at the crossing. The second charged a failure to give the statutory signals, by either ringing a bell or sounding a whistle. The third charged negligence of the flagman in his management of the gates. The fourth charged excessive speed of train, in violation of an ordinance of the town. The first additional count charged that the main track was obscured from the highway by cars on the side-tracks and by certain buildings near thereto, and that, by reason thereof, the crossing was dangerous, all of which the defendant well knew, and that defendant was guilty of negligence in approaching the crossing at a high rate of speed, etc.; and the second additional count also alleged the obstruction of the view from the highway by cars and buildings, and that the flagman of the defendant at the crossing, well knowing the near approach of the train, recklessly, negligently and willfully beckoned to the plaintiff to come on, and thereby induced the plaintiff to drive upon the tracks, etc.

The court, at the instance of the plaintiff below, instructed the jury, that if they believed, from the evidence, that the injury complained of was caused by the negligence of the defendant's servants, as charged and described in the declaration, and further believed, from the evidence, that the plaintiff, just

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before and at the time of the accident, was without fault, and was exercising all ordinary and reasonable care and prudence in crossing the railroad tracks of the defendant, then the plaintiff was entitled to recover. It is strenuously urged this instruction was erroneous.

It appears from the record that the third count of the declaration was expressly withdrawn by the court from the consideration of the jury, and it is conceded there was evidence to go to the jury upon the first, second, fourth, and first additional, counts. The objection made to the instruction is, that it submitted to the consideration of the jury all the charges of the declaration, and informed them, in effect, that there was evidence tending at least to support all of its allegations. The specific claim is, that there was an entire absence of evidence tending to prove the second additional count. We do not so understand the record. Clough, the plaintiff, testified as follows: "The gates were open, and the flagman was across the track, and he flagged me to come on. Well, I whipped up my horse when he flagged me to come on, and tried to get across as quick as I could. When I got flagged across, of course I thought it was all right, and I just whipped up my horse to get across as soon as I could." The train in question was a regular passenger dummy train, which was running on schedule time, as shown by time-card. Falsey, the flagman, was on the ground, and it was his duty to watch for and flag all trains. He was a witness for appellant at the trial, and made no claim he did not know of the near approach of the train, but, on the contrary thereof, testified he saw the wagon about the time it reached "the furthest east track," and gave it "a signal to stop." The plain implication from these and other circumstances in evidence is, that he knew the train was approaching the crossing. The jury, in their special findings, found that the flagman first gave the plaintiff a signal to cross the tracks, and subsequently gave him a signal to stop, and that the signal not to cross was not given in time

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for plaintiff to avoid the injury. Appellee was a considerable distance east of where the flagman stood, and his view was obstructed by standing cars and otherwise, and his surmise that the latter flagged him to stop "when he saw the engine," was not of controlling importance. In our opinion there was ample evidence to go to the jury tending to prove, not only that the flagman beckoned appellee to cross over the tracks, but that he did this negligently and recklessly, when he knew the train was coming. It follows from that which we have said, that there was no error in giving the instruction of which complaint is made.

The court was asked by appellant to instruct the jury, as matter of law, that the plaintiff was under an obligation, while driving across the tracks, before driving across any particular track, to look and listen for a train that might be approaching upon any of the tracks, and that the obligation which the law imposed upon him would not be satisfied by looking and listening before driving upon the first track, but that the exercise of such care and caution on his part should have existed while driving over all of the tracks. The refusal of the court to give this instruction is urged as error. A flagman was stationed at the crossing in question, and it was his duty to know and give timely warning of the near approach of trains, and appellee and the public had a right to rely upon a reasonable performance of that duty. The refusal of the court to give the instruction was fully justified by the decisions of this court in *Chicago, St. Louis and Pittsburg Ry. Co. v. Hutchinson*, 120 Ill. 587, and other cases.

It appeared at the trial, from the testimony of appellee, that he might have reached his destination by driving on Root street and crossing the tracks of appellant on that street, instead of crossing them on Forty-third street; that there are fewer tracks across Root street than across Forty-third street, and that the crossing there is safer, but that by so doing it would have taken him several blocks out of his way. The

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court refused the request of appellant to instruct the jury, as matter of law, that it was the duty of appellee to have crossed the tracks on Root street instead of on Forty-third street, and that, as he failed to do so, the verdict should be for defendant. The ruling of the court in this behalf was not erroneous. Appellee not only had the abstract right to drive upon Forty-third street, but he traveled the usual and most direct route to his destination. The mere fact that by going several blocks out of his direct course he might have crossed the railroad where there were not so many tracks and the crossing was safer, does not necessarily and as matter of law charge him with want of ordinary care.

City of Centralia v. Krouse, 64 Ill. 19, and other like cases cited by appellant, are not here in point. In the *Krouse* case the sidewalk was positively dangerous and practically impassable, and Krouse had full knowledge of this, and it was culpable negligence in him to undertake to pass over it. In the case at bar, Forty-third street was a generally traveled thoroughfare, and the crossing was guarded by a watch-tower and by gates across the street, both east and west of the railroad tracks, and a watchman was stationed there both night and day for the purpose of warning those about to cross the tracks of approaching danger. To say it is *per se* negligence to travel such street and pass over such crossing under any and all circumstances would be absurd, and would be tantamount to closing the street as a public highway.

The court very properly refused to give instructions 16, 17, 18 and 19. These instructions, severally and respectively, directed the jury to disregard the various counts of the plaintiff's declaration, but did not assume to call the attention of either court or jury to any supposed defects or variance in respect to either of said counts. If the second and fourth counts of the original declaration contained no allegations of due care and caution on the part of the plaintiff, then appellant, if he desired to avail himself of the omissions, should

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either have interposed a demurrer, or, by other appropriate action, called the attention of the court to them at some time before final judgment. If this had been done the defects could readily have been obviated by amendments. Under the instructions given to the jury, the exercise of ordinary and reasonable care on the part of the plaintiff was made a condition precedent to the right of recovery. We must hold that the alleged defects are cured by intendment after verdict. The fallacy in the argument of appellant is the claim, that by the proffered instructions exceptions were aptly and properly taken to the defective counts. This is simply "sticking in the bark," for there was nothing in the instructions indicating a claim that the counts were defective. So, also, if there was a variance between the proofs and the first amended count, as is now claimed, in that the evidence shows the injury was received in the town of Lake, whereas the count alleges that the railway "ran through a part of the city of Chicago, * * * and crossed a certain highway *in said city*, to-wit, Forty-third street," then the specific objection there was such variance should have been made in the trial court, thereby affording opportunity for amendment. In *St. Clair County Benevolent Society v. Fietsam*, 97 Ill. 474, this court held that a general objection on the ground of a variance is not sufficient,—that the party objecting should point out wherein the variance exists, so as to give an opportunity for obviating the same by amendment. The instruction in this case did not show even so much as that it was based on any claim that there was a variance. *City of Mattoon v. Fallin*, 113 Ill. 249; *Wight Fire Proofing Co. v. Poczekai*, 130 id. 139.

Complaint is made that the court modified the third, sixth, eighth and ninth instructions asked by appellant. The substance of the third instruction, as submitted to the court, was, that if the evidence was evenly balanced, or if it preponderated, as to a material point, in favor of the defendant, the finding should be, not guilty. In many cases this instruction would

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have been a correct statement of the law, but in the case before us it would have been misleading and erroneous. It is to be borne in mind that the declaration consisted of six counts, and that many different and material acts of negligence were alleged therein, one or more of them being charged in each of the several counts, and each of the counts stating a good cause of action. The instruction was not so framed as to be applicable to one count only, or to each of the counts severally. Had it been given without modification it would have imposed upon the plaintiff the burden of proving, by a preponderance of evidence, as a condition precedent to the right of recovery, each and all of the material acts of negligence contained in each and all of the counts. The court struck out the words, "as to a material point," and the instruction, as given, stated a correct proposition of law.

Instruction No. 6, as asked, was as follows:

"If the jury believe, from the evidence, that the flagman on the crossing did not flag the plaintiff to cross the tracks at all, and if the jury further believe, from the evidence, that he signaled the plaintiff not to cross, then the jury are instructed, as a matter of law, that the plaintiff is not entitled to recover in this case, even if the jury should also find, from the evidence, that the gates were not lowered on the crossing, that no bell was rung or whistle sounded, and that the train was moving at a rate of speed in excess of that prescribed by the ordinances of the town of Lake."

The court modified this instruction by inserting, after the words "not to cross," the words, "in time for the plaintiff, by the exercise of reasonable care, to have avoided the injury." The modification was manifestly proper. If the gates were not lowered on the crossing, and no bell was rung or whistle sounded, and the train was moving at a rate of speed in excess of that allowed by the ordinances of the town, then the mere fact that the flagman signaled the plaintiff not to cross the tracks would not free the appellant from culpable negli-

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gence, if the signal to stop was not given in time for the plaintiff, by the exercise of reasonable care, to have avoided the injury. The claim of appellant that "any warning of the approach of a train would be sufficient to prevent a recovery," is wholly inadmissible. The very object of placing a watchman at a railroad crossing is that he may give timely warning, and thereby prevent injury to persons or property.

The eighth instruction, as asked, declared that if the witness Pickley attempted to prevent the plaintiff from crossing, in time to avoid the injury, then there could be no recovery. The instruction wholly ignored the question whether appellee had any notice or knowledge of such attempt. There was no error in refusing to give it as asked.

Instruction No. 9 was as follows:

"The jury are instructed, as a matter of law, that under the evidence in this case the plaintiff is not entitled to recover, even if the jury believe, from the evidence, that the flagman signaled him to come across the track, and if the jury also believe, from the evidence, that no bell was rung or whistle sounded, provided the jury believe, from the evidence, that the plaintiff could, by looking and listening, have discovered the approach of the train in season to avoid the accident complained of."

The court modified it by striking out all after the word "plaintiff," where it last occurs, and substituting therefor the words, "did not exercise ordinary and reasonable care, under all the circumstances, as shown by the evidence, to discover the approach of the train and prevent being injured." The instruction, as asked, deprived appellee, as matter of law, and wholly regardless of the surrounding circumstances, of the right to place any reliance whatever upon the signals given by the flagman, and it was therefore properly refused. As modified and given, it stated the law in substantial conformity with the views heretofore expressed by this court. See *Chicago*,

Additional opinion of the Court.

St. Louis and Pittsburg Ry. Co. v. Hutchinson, *supra*, and authorities there cited.

Under the rule as announced by this court in *Chicago and Northwestern Ry. Co. v. Dunleavy*, 129 Ill. 132, there was no error in the action of the court in refusing to submit to the jury certain questions of fact for special findings thereon, since such questions of fact were merely of an evidentiary character.

The newly discovered evidence relied upon by appellant was cumulative and wholly inconclusive, and afforded no sufficient ground for awarding a new trial.

We have examined the other objections to the judgment that are urged by appellant, but they do not seem to require special notice. Suffice it to say, that we find no substantial error in the record.

The judgment is affirmed.

Judgment affirmed.

Subsequently, on May 7, 1891, on an application for a rehearing, the following additional opinion was filed:

BAKER, J.: The only point urged for a rehearing is, that in disposing of the appeal we did not make special mention of one of the grounds which was relied on for a reversal of the judgment. The matter in question did not, as seems to be supposed, "escape the observation of the court," for it was duly considered, but we thought that the views expressed in the opinion obviated any necessity for its discussion.

At the trial, one of the witnesses was permitted to testify, over the objections of the appellant, that the flagman, in addition to attending to the crossing, was in the habit of cleaning the lamps of some eight or ten of the switchmen, for pay. It is claimed that this testimony was not only inadmissible, but clearly prejudicial to appellant. The flagman may have been in the habit of cleaning the lamps, *non constat* he ever did it while on duty as flagman, or to the neglect of his duties as such. To say that the circumstance of such lamp cleaning

Additional opinion of the Court.

was evidence tending to show that the flagman was in the habit of neglecting his regular duties in order to make money by cleaning the lamps of the switchmen in the yard, seems to be placing a forced and too broad a construction upon it.

But conceding that the fact stated was evidence tending to prove customary negligence, and that evidence of that kind was inadmissible, yet that in this particular case it worked no detriment, we think is manifest from the record. It is, as we have heretofore seen, a conceded fact that the flagman knew of the near approach of the train by which the injuries were inflicted, and, as we have also heretofore seen, the jury found in their special findings that the flagman first gave the plaintiff a signal to cross the tracks, and afterwards gave him a signal to stop, and that the signal to stop was not given in time for the plaintiff to avoid the injury. It thus affirmatively appears that the conclusion of the jury that the flagman was guilty of culpable negligence was based upon a finding of the fact, which is here conclusive, that he was guilty of the specific negligence indicated by the special findings, and which is charged in the second additional count of the declaration. Such being the case, appellant is legally bound to respond in damages to the full measure of compensation for the injuries sustained by appellee. It is therefore immaterial that incompetent testimony was admitted which tended to show that the flagman was guilty of negligence of a wholly different character from the specific negligence of which the jury convicted him.

The petition for a rehearing is denied.

Rehearing denied.

Syllabus. Brief for the Plaintiff in Error.

JOHN OGDEN

v.

THE PEOPLE OF THE STATE OF ILLINOIS.

Filed at Mt. Vernon November 5, 1890.

1. EVIDENCE—*facts from the sense of hearing—as distinguished from mere matter of opinion.* The statement of a fact by a witness which he ascertained through the sense of hearing, is not the statement of mere matter of opinion, but is the statement of a conclusion reached directly and primarily from an operation of the sense of hearing, and is admissible in evidence.

2. SAME—*accused testifying in his own behalf—on cross-examination, asking as to a prior conviction of another offense.* On a trial of one under an indictment for robbery, the defendant testified in his own behalf, and on cross-examination he was asked if he had not been indicted and convicted of an assault to kill. On objection, the court ruled that the witness might answer the question or not, as he saw fit. Defendant's counsel, understanding that the court allowed the question, directed him to answer, and he testified that he had been once indicted for the offense named, and convicted simply of an assault and battery: *Held*, that there was no error. A misapprehension of counsel can not be regarded as an error on the part of the court.

WRIT OF ERROR to the Circuit Court of Randolph county;
the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. GORDON & ALLISON, for the plaintiff in error:

The opinions of witnesses are generally inadmissible. *Gallagher v. People*, 120 Ill. 180; 1 Greenleaf on Evidence, sec. 440.

As to the sufficiency of the evidence, see *Ackerson v. People*, 124 Ill. 563; *Feister v. People*, 125 id. 348; *McMahon v. People*, 120 id. 581.

The State can not show a conviction of an assault and battery, for the purpose of affecting credibility. *Bartholomew v. People*, 104 Ill. 601.

The State can not prove particular acts of bad conduct against the accused in a criminal prosecution. Proof of his

Brief for the People. Opinion of the Court.

general character, only, is admissible. *Engleman v. State*, 2 Ind. 91; 52 Am. Dec. 494; *People v. Greenwall*, 108 N. Y. 296.

Mr. GEORGE HUNT, Attorney General, for the People:

The testimony relating to the identity of the prisoner by his voice is claimed to be opinion. It is an opinion of fact, and not on the fact. Every statement of a witness is an opinion in the same sense that this is an opinion. Every man possessed of all his faculties has five senses, and each and all of these may be used by him in obtaining information as to any fact. If by the use of any or either of his senses he ascertains a fact, he may state that fact as a fact, if otherwise competent. If a man sees an object, and testifies to its identity, he only gives an opinion. That opinion, however, is one derived directly from the operation of his own senses as an existing fact, and not an opinion based upon information of a secondary character, and arrived at as a logical conclusion from facts known or secondarily obtained.

The witnesses do not give it as an opinion in the sense of uncertainty, or as a logical conclusion from the consideration of a combination of evidentiary facts, but state directly, positively and unequivocally, that the assailant was John Ogden. That was a conclusion reached directly and primarily from an operation of the senses, or the sense of hearing.

Mr. JUSTICE BAKER delivered the opinion of the Court:

Plaintiff in error was indicted, tried and convicted upon a charge of robbery, and sentenced to the penitentiary for a term of ten years.

On November 2, 1889, Andrew Martin received pension money amounting to \$240. He lived about a mile from Brewerville, in Randolph county. On the night of November 5 following, he, his wife and his daughter were asleep, when they were aroused by a rap at the door. He lit a lamp, went to the door and opened it, and a man outside, who had his face

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wrapped up in a red flannel, ordered him to blow out the light and give up his money, or he would blow his brains out. Martin, influenced by this threat, delivered up \$173 in money. During the transaction other conversation besides that which we have referred to passed between the parties.

The material question in the case is in respect to the identification of plaintiff in error as the party who committed the robbery. Martin, his wife and his daughter had known plaintiff in error for some ten years, and he had frequently been at their house. At the trial, both Lucretia Martin, the wife, and Lucinda Martin, the daughter, testified positively to the identification, and that they recognized him by his voice. It was also shown in evidence that Andrew Martin had died after the preliminary examination and prior to the trial, and that at such examination the testimony given by him was substantially the same as that of Lucretia and Lucinda at the trial. This evidence was corroborated by the testimony of Gus Clark and James McNab, in regard to plaintiff in error leaving his room, about two miles from the place of the robbery, at about ten o'clock on the night the crime was committed, and also in regard to statements made by him the next morning. On the part of plaintiff in error there was positive denial of guilt by himself, and also evidence tending to show that he was very drunk both shortly before and shortly after the time that the robbery is supposed to have been perpetrated, and also testimony of an inconclusive and unsatisfactory character tending to prove an *alibi*.

The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly and primarily from an operation of the sense of hearing. A witness can learn and know facts by and through the exercise of his perceptive faculties,—his five senses,—and such facts he may state. (*City of Aurora v. Hillman*, 90 Ill. 61.) It was a question of fact for the deter-

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mination of the jury whether or not the testimony in question sufficiently established the matter of identification, and we are unable to say that the conclusion reached by them was not justified by the evidence, considered as a whole.

In *Klein v. The People*, 113 Ill. 596, it was held, that where the proof clearly shows the commission of a robbery, and the defendant is identified as the guilty party by two witnesses, and an *alibi* is relied upon in defense, which is not very satisfactorily proved, giving allowance for differences in time and the opinions of witnesses of the time when the offense was committed, and owing to the proximity of the place where the robbery occurred, a judgment on a verdict finding the defendant guilty will not be reversed. The decision in that case seems to be very much in point when applied to the testimony found in this record.

Plaintiff in error was examined as a witness in his own behalf, and, on cross-examination, he stated that he had once been indicted for an assault to kill, and convicted upon that indictment for an assault and battery. The question which elicited this information was objected to, and the court ruled that the witness might answer or not answer, as he desired. It appears from an affidavit submitted on the motion for a new trial, that the attorney for the defendant misunderstood the ruling of the court, and told his client to answer the question. It is very clear that a misapprehension of counsel can not be regarded as an error on the part of the court. Besides this, it is hardly to be supposed that the mere fact that the defendant had at one time been convicted of an assault and battery could have influenced the jury in the rendition of their verdict.

There is no claim that there was any error in the instructions of the court to the jury.

There is no error in the record. The judgment is affirmed.

Judgment affirmed.

THE LAKE SHORE AND MICHIGAN SOUTHERN RAILWAY COMPANY

v.

ESTHER E. TAYLOR.

Filed at Ottawa October 31, 1890.

1. **INJUNCTION**—*after the act is done*—*writ improvidently granted*. Where the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act will be improvidently granted, and will be properly dismissed on the hearing.

2. **SAME**—*from what time operative*. An injunction becomes operative, not merely from the time the writ is issued, but from the moment it is ordered by the judge.

3. **WRIT OF RESTITUTION**—*after dissolution of injunction*. After a person who claimed a strip of ground had inclosed the same by a fence, an adverse claimant procured an injunction restraining him from taking possession of the land or erecting the fence thereon, and while the defendant was restrained by the writ the complainant tore down such fence, and included the strip with his adjoining enclosure. It was held proper for the court, in dissolving the injunction, to restore the defendant to possession by a writ of restitution. The court should place the parties *in statu quo*.

APPEAL from the Appellate Court for the First District;—heard in that court on appeal from the Circuit Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

Mr. PLINY B. SMITH, for the appellant:

The purpose of a writ of injunction is to maintain the *status quo* until the court can hear the case, and make such order as a deliberate consideration of the case may require; and where a person procures a writ of injunction, and thereby ties the hands of the opposing party, and then himself changes the *status*, the court will require the party so abusing its process to restore matters to their original condition. In this case, it was the duty of the court to dismiss the bill and restore this property to the defendant. *Wangelin v. Goe*, 50 Ill. 459; *Herrington v. Herrington*, 11 Bradw. 121; *Hawks v. Champion*,

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Cary, 51; *Dowche v. Beriot*, id. 63; *Hill v. Portman*, id. 140; *Van Zandt v. Mining Co.* 2 McCreary, 642.

Messrs. BOOTH & BOOTH, for the appellee.

MR. CHIEF JUSTICE SCHOLFIELD delivered the opinion of the Court:

Appellant and appellee claimed title, adversely to each other, to a strip of ground some twenty-five feet in width. On the 16th of June, 1886, appellant caused a fence to be built so as to place this strip within appellant's enclosure. On the next day, and after the fence was built, appellee caused a bill in chancery, alleging her ownership and present possession of this strip of ground, threats of appellant to invade her possession, and praying that an injunction issue enjoining appellant from invading her possession and from building a fence enclosing the strip within appellant's enclosure, to be prepared and presented to one of the judges of the circuit court of Cook county. The judge to whom the bill was presented, as early as two o'clock P. M. of that day, made and endorsed an order thereon that the writ of injunction issue, as prayed therein. The writ of injunction was issued about three o'clock P. M. of that day. At or about the same time that the writ of injunction was issued, appellee, by her servants, commenced tearing down the fence which had been built by appellant to enclose the strip in dispute on the day before, and thereafter, on the same day, completed the tearing down of the fence. In October, 1886, appellee caused a fence to be built so as to enclose the strip in dispute, with other real estate claimed by her about which there is no controversy here in regard to her title. Appellant answered appellee's bill, putting in issue the material allegations thereof, and also filed a cross-bill, praying affirmative relief.

On hearing, the circuit court decreed that the original and cross-bills be dismissed, that the injunction be dissolved, and

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that a writ of restitution restoring the possession of the strip in dispute to appellant issue. From that decree the present appellee appealed to the Appellate Court for the First District, and that court affirmed so much of the decree of the circuit court as dismissed the original and cross-bills and dissolved the injunction, but ordered that said bills be dismissed without prejudice, and reversed so much of it as awarded a writ of restitution. The arguments on this appeal relate only to this last branch of the judgment of the Appellate Court.

Since the wrong which appellee sought to have avoided by the injunction had been done before her bill was filed, and she knew it, the preliminary injunction was improvidently granted, and it was therefore properly dissolved on the hearing. (*Wangelin v. Goe*, 50 Ill. 459; *People v. Siwanson*, 10 Mich. 335.) The injunction became operative, not merely from the moment the writ was issued, but from the moment it was ordered by the circuit judge. (High on Injunctions, sec. 382.) After that order was made, appellee could have prevented appellant from doing any act forbidden by it, by simply giving appellant actual notice of the existence of the order. (High on Injunctions, *ubi supra*; 3 Daniell's Ch. Pr. 1783; *Endicott v. Mathews*, 1 Stock. 110.) Necessarily, therefore, as well when appellee caused the fence to be torn down as when she afterwards caused her fence to be built, she was protected against any interference by appellant, by the order of the judge granting the injunction. Appellant's hands were, as to her, during all that time, tied, so that appellant could, by no possibility, do any legal act in assertion of its claim of ownership or right of possession.

The only function of an injunction is to stay threatened action, and suspend the conflicting claims of right of the respective parties where they then are, until they can be properly adjudicated. (2 Daniell's Ch. Pr. 5th ed. 1639, and note.) And so it must necessarily follow, that to allow one party to obtain any advantage by acting when the hands of the adverse

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party are thus tied by the writ or the order for it, is an abuse of legal process, which can not be tolerated. It is immaterial here in whom is the legal title, or whether when appellant built its fence it was a trespasser or lawfully in possession,—those questions can not be determined here. It is sufficient, for the present, that appellee, after having tied the hands of appellant as to the assertion of its claim of right, and while they were so tied, has changed the *status quo* of the parties in this respect. She must restore things to the same plight and condition, as nearly as possible, in which they were when the judge made the order upon her bill that an injunction issue. 1 Spence's Eq. Jur. 672, *673; *Vanzandt v. Argentine Manf. Co.* 2 McCreary, 642; *Hawks v. Champion*, Cary, 51; *Dowche v. Beriot*, id. 63; *Hill v. Portman*, id. 140; *Wangelin v. Goe*, *supra*.

So much of the judgment of the Appellate Court as reverses or modifies the decree of the circuit court is therefore reversed, but in all other respects it is affirmed.

Judgment reversed in part and in part affirmed.

Mr. JUSTICE MAGRUDER, dissenting.

HENRY A. BARLING *et al.*

v.

WILLIAM H. PETERS, Receiver.

Filed at Ottawa October 31, 1890.

1. JUDICIAL SALE—confirmation of sale—improper conduct on the part of purchaser, officer, etc.—to prevent confirmation. A sale of land by the master under a decree will not be approved by the court, if fraud or misconduct on the part of the purchaser, the officer conducting the sale, or other person connected therewith, is shown, or if it be made to appear that a party interested has been surprised or led into a mistake by the conduct of the purchaser, officer or other person connected therewith. Confirmation of such sale will not be refused, however, on

134	606
135	13
134	606
143	66
134	606
180	573
180	631

134	606
190	1622
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the motion of an interested party, merely to protect him against the consequences of his own negligence, when he is under no disability to protect his own rights.

2. *SAME—as to sum to be bid—secret agreement—whether affecting validity of sale.* An agreement of a prospective bidder at a judicial sale, not a party to the decree, made with an interested party, to bid at the sale a certain amount necessary to a sale, and a higher sum named if compelled by competing bidders, although kept secret from the other parties to the suit and bidders, is not fraudulent, or calculated in any way to prejudice the rights of other parties in interest. A bidder is not bound to disclose the amount he is willing to bid, rather than lose the land.

3. A party whose interest it is to procure a certain price for a tract of land, and who may have agreed to bid to that amount, may lawfully contract with another person to induce him to become the purchaser at the same price he was to have bid, and such an agreement can not be said to be fraudulent, as stifling bidding or preventing competition.

4. A decree for the sale of land provided that there should be no sale unless at least \$600,000 was bid, and that out of the purchase money \$505,000 should be paid to certain parties for advances, etc., and also one-half of the balance. The other half of the balance was to be paid to a creditor of another one of the parties, then deceased, to the amount of \$83,000. The creditor, through a receiver, entered into a secret agreement with a third party, whereby the latter was to purchase the creditor's interest in the decree in case he became the purchaser of the land, and to bid, if necessary, \$760,000 to get the land. The sale was extensively advertised and conducted fairly. Such third party became the purchaser at \$602,000, which was a fair price, and it did not appear that any greater sum would be bid on a resale: *Held*, that there was no sufficient ground for refusing to approve the sale, and that a resale was properly denied.

5. *SAME—inadequacy of price.* Where a judicial sale has been conducted in the usual manner, and the purchaser is a stranger to the order of sale, mere inadequacy of price will not justify a court in vacating the sale, so as to deprive the vendee of the benefit of his purchase, unless the inadequacy is such as to amount to evidence of fraud.

6. *SAME—objections to confirmation—evidence—whether oral, or by affidavit.* Upon the hearing of objections to the confirmation of the master's report of a sale of land under a decree, it was proposed to place a witness upon the stand to be examined orally upon the questions involved. This the court refused to allow, and in so ruling there was no departure from the usual practice in such cases,—presenting the proofs by affidavit. It was not shown the matters could not be presented fully and fairly in that way, nor was it made to appear what was expected to be proven on the proposed oral examination.

Statement of the case.

WRIT OF ERROR to the Circuit Court of Cook county; the Hon. LORIN C. COLLINS, Judge, presiding.

On the 20th day of June, 1864, Robert W. Hyman purchased an undivided half of section 21, township 39, north, of range 13, east of the third principal meridian, Cook county, Illinois, for himself and Edward Mott Robinson, the latter furnishing all the money to make the cash payments. The title was taken in the name of Hyman, but he subsequently conveyed it to Robinson, with an agreement that Hyman should sell the premises within one year from that date, unless otherwise agreed upon, Robinson to advance all money to pay taxes and deferred payments to be made before such sale, and, upon the sale being made, the proceeds to be distributed by first reimbursing Robinson for all advances made by him, with interest at the rate of seven per cent per annum, and dividing the balance equally between the parties. On the 24th of September, 1867, they further agreed to purchase the other undivided half of said section, on the same terms, but before this purchase was consummated, Robinson died. By his will, the title to all his real estate was vested in Henry A. Barling, Edward D. Mandell and Edward H. Green, as trustees for his daughter, Hetty H. R. Green. Henry A. Barling and Abner H. Davis were appointed executors of this will, and they proceeded to, and did carry out said last named agreement, taking the title to the other half of said section in their names, and advancing the purchase money therefor, agreeing with Hyman to the same effect as had been agreed between Robinson and Hyman. Hyman was indebted to the Exchange National Bank of Norfolk, Virginia, and he and the said executors agreed in writing with said bank, that on a sale of said lands, said executors should hold Hyman's share of the proceeds, to the amount of said indebtedness, for the benefit of the bank. Subsequently Hyman also died, and Robert W. Hyman Jr. was appointed his administrator. Said bank be-

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came insolvent and passed into the hands of one William H. Peters as receiver. He filed his bill in chancery in the Circuit Court of Cook county, against said trustees, said executors, and said Hetty H. R. Green, and said administrator of Robert W. Hyman, deceased, to enforce a sale of said land, and compel said executors to apply Hyman's interest in the funds arising therefrom, to the payment of the said indebtedness to said bank.

On the 9th of April, 1888, a decree was rendered according to the prayer of the bill. It found that the executors of said Robinson were first entitled to receive, out of the proceeds arising from the sale of said land, the sum of \$505,414.06, with interest thereon from January 1, 1888, at seven per cent per annum, to April 9, 1888, and thereafter six per cent per annum; that one-half of the residue of said proceeds should be paid to said executors; that out of the other half, the sum of \$83,426.35, the amount of said Hyman's indebtedness to said bank, with six per cent per annum interest thereon from the date of the decree, should be paid to said William H. Peters, receiver of said bank, and the residue of said half, if any, should be paid to said administrator of Robert W. Hyman, deceased, and it was decreed, "that the joint adventure so entered upon during the lifetime of said Robert W. Hyman and said Edward Mott Robinson, evinced by the said contracts, of June 20, 1864, and September 24, 1867, be wound up and closed, and if the amount so found due complainant should not be paid by defendants, or some of them, with interest, within twenty days, section 21 should be sold by George Bass, master, for purpose of distribution of proceeds in accordance with the finding of the decree."

The decree further provides for four weeks' notice, and that the sale shall be for cash; that the premises shall be offered in tracts of ten, twenty, forty, or more acres, and any portion not so sold, in smaller tracts, or the whole of said section, if no portion of the same shall be sold, shall be offered for sale

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by the said master; that each bidder, as an earnest of his bid, deposit with the master twenty per cent of the amount bid, before the same shall be struck off to him, and the balance shall be payable when such sale shall have been confirmed by the court and a deed have been made by said master. It was provided also in the decree, that any of the parties to the suit might bid at the sale, "and become purchasers as individuals, and divested of their trust relations." The master was directed to report to the court, with convenient speed, his doings in the premises, and the court reserved the right to reject any and all bids "if said premises shall not produce the sum of \$600,000, or for other sufficient cause, and the entry of an order of distribution until the coming in of said report." It was further decreed that the sale so to be made, when confirmed, and the deeds in pursuance thereof, should operate to vest in the purchaser or purchasers, respectively, all the right, title, interest and claim of any of the parties to this suit in or to said section 21, and as an extinguishment of any right or claim of lien thereon, as trustees or otherwise, on the part of said Barling, Mandell and Edward H. Green. It was further ordered, that if upon a sale said section should not produce the sum of \$600,000, the bill of complaint should be dismissed at complainant's costs, without prejudice to his right to enforce the indebtedness due from the estate of Hyman to the bank, but not against said section 21, as under the pledges to said bank, made as aforesaid by said Hyman.

That decree was affirmed by this court, the opinion being filed at Ottawa, June 15, 1889, and a petition for a rehearing overruled at the following October term. On the 10th day of January, 1890, the master made his report of sale, stating that, after advertising said premises as directed by said decree, he did, on the 21st of December, 1889, offer the same for sale, first, in parcels, but receiving no bids therefor, he then offered the whole section en masse, and George M. Bogue bid therefor the sum of \$602,000, which being the highest and

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best bid, and said Bogue having given his certified check for \$120,400, being twenty per cent of his bid, the same was struck off and sold to him for said sum of \$602,000. To this report, Henry A. Barling, executor, Henry A. Barling, Edward D. Mandell and Edward H. Green, trustees, and Robert W. Hyman Jr., administrator, filed their joint and several objections.

"They jointly and severally object to the confirmation of the master's report of sale filed herein, January 10, 1890, and jointly and severally move and petition the court to reject the bid of \$602,000 of George M. Bogue, therein mentioned, and to disapprove and vacate the sale of section 21, of the town of Cicero, therein reported as having been made to the said Bogue on the 21st day of December, 1889, and to order a re-sale of said premises in the above case, in conformity with the decree of sale entered therein, upon such terms as to the court may appear proper, and in accordance with the interests of the parties.

"And as the grounds of said motion and petition, show the court that the said George M. Bogue was not a *bona fide* purchaser under said decree, nor was the sum of \$602,000 the entire purchase money agreed to be paid for the premises so sold; that, on the contrary, the said Bogue, although publicly bidding the said sum of \$602,000 as and for the entire purchase money of said premises, made such bid under and in accordance with a secret and collusive understanding with the complainant herein, to allow to the said receiver, out of the actual purchase money of said premises to be paid by said Bogue, a further sum of money sufficient to satisfy the claim of the said receiver, and interest up to date of the sale, to-wit, the sum of \$91,921.92, which collusive agreement of the said Bogue with the said receiver the said Bogue and the said receiver will carry out upon the confirmation of the present sale, if the same should be confirmed, so that out of such purchase money, and in fraud of the express terms of the decree of sale,

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and in fraud of the rights of the petitioners herein, the said Bogue is to pay the said receiver his said claim in full, and limit the amount to be received by the said Barling from said proceeds, in excess of the account for advances and interest, to one-half the difference between that account and the amount of said Bogue's bid, which one-half, after deducting one-half of \$1500 for the estimated costs, would equal only the sum of \$12,465.79, it being the intent and purpose of the said Bogue and the said receiver, in the agreement aforesaid, to confine the share and interest of the said Barling and the said trustees in the proceeds of such sale to the amount publicly reported by the said master as the limit of the purchase to be paid by said Bogue,—all of which agreements are fraudulent and contrary to equity, and were knowingly and willingly kept secret from the undersigned until after the said sale, so that they did not learn of the same until the day following.

"2d. And for that, also, the said Bogue, although, at and up to the time of the said sale, assuming and professing to the undersigned defendants to be an agent of the said receiver for the purpose of furthering a sale to the highest bidder, under and in accordance with the decree of sale in said cause, and undertaking such agency and assuming the duties thereof, was acting under a secret agreement with the Grant Locomotive Works, or the promoters of the organization of a corporation under the laws of the State of Illinois to bear that name, including the said Bogue, as one of such promoters, which agreement had also the consent and co-operation of the said receiver, and was carefully kept from the knowledge of defendants until after the master's sale aforesaid, and was to the effect and substance that the said Bogue, while outwardly professing to the defendants to be the agent of the said receiver in and about the effecting of a sale of said premises under the decree, should secretly represent the said corporation, or the promoters thereof, or some of them, as the bidders and purchasers of said property; and it was further a

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part of said agreement, that said receiver should also publicly bid at such master's sale as if in competition with the said Bogue, but in reality under a prior agreement with the said Bogue, who should be allowed to purchase said premises at as small an advance above the minimum of \$600,000 fixed by the decree as would suffice to secure the said land to the said Bogue and his associates and confederates; and it was further a part of said agreement between said Bogue, as such agent, and said receiver, that the said receiver would not compete with the said Bogue at such sale, and that the said Bogue should be allowed to purchase the said land without competition from said receiver, and as cheaply as he could from the said master, and at a bid to be publicly announced and reported by said master to the court, upon the condition that the said Bogue would pay to the said receiver the claim of the said receiver in full, with interest down to the date of said sale, which had been previously figured over between them, and agreed upon at the sum of \$91,921.92, which sum is to be paid in pursuance of said agreement, provided the parties thereto can induce this court to confirm said sale and authorize a conveyance of the said land to said Bogue.

"And for that the said receiver has abused the process of this court, and availed himself of the salable value of said land under said decree, and thereby has secretly sold said premises for a sum greatly in excess of the sum of \$602,000 reported by said master, all which excess he and the said Bogue intend to divert to the purpose of paying said receiver's claim in full, and so to avoid sharing the same with the persons entitled thereto under said decree, as aforesaid.

"And for that the said premises have been sacrificed, according to the sale reported in said report, at the inadequate sum of \$602,000, when the same were worth at least the sum of \$800,000 or \$850,000, or thereabouts, and when the purchaser thereof is actually to pay, under this agreement afore-

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said, the sum of \$681,456.13, or thereabouts, instead of said sum of \$602,000."

Also, afterwards, by way of amendment, to said objections, they filed the following:

"And for that the said Peters, who, as receiver, was and is pledgee of the interest of the estate of Robert W. Hyman, deceased, had obtained, by an under-bargain, full payment, or means of payment, and satisfaction of the claim held by him against the estate of said Hyman, out of the purchase money arising from the sale of said section 21, and by means of said under-bargain, and the pretended and collusive sale and assignment of said decree to the purchaser at said sale, has prevented the said claim against said estate from being fully paid and satisfied, as in law and equity it ought to have been; and for that the said purchaser now holds outstanding, as a claim against said estate, an unsatisfied deficit or balance of \$79,000, or thereabouts, of said claim, as against the estate of said Hyman."

William H. Peters and George M. Bogue, by their sworn answer, admit the execution of the agreement, a copy of which was made an exhibit to one of the affidavits filed with and in support of the objections, which agreement is in the words and figures following, viz:

"William H. Peters, as receiver of the Exchange National Bank of Norfolk, Virginia, and Bogue & Hoyt, do hereby agree as follows:

"*First*—The said Peters, receiver, agrees to sell to Bogue & Hoyt all right, title, interest and claim which he now has in or to the decree entered on the 9th day of April, 1888, in the circuit court of Cook county, in case No. 62,375, entitled *William H. Peters, receiver, etc. v. Robert W. Hyman, Jr., Admr. etc. et al.*, and which amounts to \$83,426.35, with interest from the entry of said decree, no payment having been made thereon.

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"*Second*—The said Bogue & Hoyt agree to pay the said Peters, receiver, therefor, the sum of \$83,426.35, with interest from the 9th of April, 1888, at the rate of six per cent per annum, of which sum \$2000 have been paid, and the receipt thereof is hereby acknowledged. The remainder is to be paid as soon as the sale to be made in pursuance of said decree shall have been confirmed by the circuit court of Cook county.

"*Third*—It is understood that unless said Bogue & Hoyt, or a member or representative of said firm, shall become the purchaser of section 21, township 39 north, range 13, east of the third principal meridian, at such sale, and the premises shall be struck off to them and such sale afterwards confirmed by said court, this agreement shall not be binding upon either of the parties hereto, and the sum of money paid, as aforesaid, on account of said purchase, shall be returned to said Bogue & Hoyt.

"*Fourth*—In order to secure said property, Bogue & Hoyt agree to bid up to the sum of \$760,912.26, or so much as may be necessary to have the same struck off to said firm or its representatives, it being understood that said firm shall not be required to bid a larger sum, in any event, than such last mentioned sum.

"*Fifth*—It is understood that time shall be of the essence of this agreement, and that upon the payment of the full sum to be paid to said Peters, receiver, he shall execute and deliver to said Bogue & Hoyt any instrument or instruments of writing which shall reasonably be devised or required for the purpose of giving effect to this agreement in carrying out of the intent thereof.

"Witness the hands of said parties this 20th day of December, 1889.

WILLIAM H. PETERS, *Receiver of the*
Exchange Nat. Bank of Norfolk, Va.,
By Smith & Pence,
BOGUE & HOYT."

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This agreement, they allege, expresses the whole of the contract of the parties thereto in that behalf, and they deny that it was in fact or in intent in fraud of the terms of the decree, or of objectors; they admit that the said agreement was not known to objectors until after said sale, but deny that there was any obligation on their part to disclose the same to them. They deny that said \$602,000 was not the entire purchase money agreed to be paid for said land. They deny that up to the time of and at said sale the said Bogue professed to the objectors to be an agent of said Peters, receiver, for the purpose of furthering the sale to the highest bidder, and they further deny that he was then, or has been at any time hitherto, under any duty or obligation to the said objectors, or was bound to disclose to them any of his acts or doings in that behalf; they admit that in bidding for said premises at such sale Bogue was acting for and on behalf of persons engaged in the organization of a corporation to be known as the Grant Locomotive Works, or under a similar name, but they deny that the said Peters was a party to such organization, or had any interest or share therein; they deny that there was any agreement by which it was understood or agreed that said receiver should bid at such sale as if in competition with the said Bogue; they deny that they, or either of them, have abused the process of the court, or have been guilty of any fraud, collusion, deceit or of any act by which the said objectors could have been or were misled or deprived of the opportunity of bidding at the sale; they deny, also, that said premises were sacrificed at said sale or sold for an inadequate price, and they aver that said objectors, not having offered to reimburse the respondent, Bogue, as a purchaser, for his outlays, attorney's fees and expenses, nor for interest thereon, and not having offered to pay any sum for said premises in case of resale, are speculators, and not entitled to the consideration or courtesy of the court.

Brief for the Plaintiffs in Error.

Messrs. PADDOCK & WRIGHT, and Mr. NEWTON A. PARTRIDGE, for the plaintiffs in error:

Any agreement made for the purpose of reducing competition at a judicial sale, or a sale under process of law, is fraudulent and void; and if the purchaser at such sale is a party to such an agreement, he can take no benefit under his purchase, and the sale will be set aside by the court. *Longwith v. Butler*, 3 Gilm. 32; *Jones v. Caswell*, 3 Johns. 29; *Thompson v. Davies*, 13 id. 110; *Hook v. Turner*, 22 Mo. 333; *Greenhood on Public Policy*, 183; *Bateman on Auctions*, 121, and note; *Rorer on Judicial Sales*, sec. 77; *Story's Eq. Jur.* sec. 293, and note; *Gibbs v. Smith*, 115 Mass. 592; *Gardiner v. Morse*, 25 Me. 140; *Martin v. Blight*, 4 J. J. Marsh. 491; *Coffey v. Coffey*, 16 Ill. 141; *Stoker v. Greenup*, 18 id. 27; *Mapps v. Sharpe*, 32 id. 13; *Devine v. Harkness*, 117 id. 145; *Meeker v. Evans*, 25 id. 322.

The actual result of the agreement does not control, but the test is, whether the agreement was intended by the purchaser or calculated to reduce competition. *Gibbs v. Smith*, 115 Mass. 592; *Thompson v. Davies*, 13 Johns. 110; *Longwith v. Butler*, 3 Gilm. 32.

Courts of equity supervise all sales under their orders, and may reject, set aside or confirm sales, and may order resales at discretion, as equity may require. The bidder acquires no vested rights until the sale is confirmed. *Rorer on Judicial Sales*, sec. 394; *Deaderick v. Smith*, 6 Humph. 146; *Bussey v. Hardin*, 2 B. Mon. 407; *Foreman v. Hunt*, 3 Dana, 614; *Owen v. Owen*, 5 Humph. 352; 2 *Pomeroy's Eq. Jur.* sec. 444.

The courts distinguish between sales at law or ministerial sales, and those under the immediate direction of the court, pursuant to its decree. *Pomeroy's Eq. Jur.* 444; *Bussey v. Hardin*, 2 B. Mon. 407; *Foreman v. Hunt*, 3 Dana, 614; *Owen v. Owen*, 5 Humph. 352.

Briefs for the Defendants in Error.

Messrs. SMITH & HARLAN, for the defendants in error:

It is only agreements not to compete at a sale that the law condemns. *National Bank v. Sprague*, 5 Green, (N. J.) 159; *Phippen v. Stickney*, 3 Metc. 384; *Gibbs v. Smith*, 115 Mass. 592; *Wicker v. Hoppock*, 6 Wall. 94; *Devine v. Harkness*, 117 Ill. 145.

Messrs. LYMAN & JACKSON, for the defendant in error George M. Bogue:

The property was sold for full value, considering that the entire section was sold and the sale was a judicial sale. Affidavits of purchase show the fair cash value of the land on the day of sale. *Comstock v. Purple*, 49 Ill. 158; *Duncan v. Sanders*, 50 id. 475.

It is no ground for setting aside the sale that the objectors misunderstood what the complainant or the agent of the purchaser proposed to do. *Comstock v. Purple*, 49 Ill. 158; *Cooper v. Crosby*, 3 Gilm. 506.

The English practice of opening biddings does not apply in this country. *Livingston v. Byrne*, 11 Johns. 556; *Williamson v. Dale*, 3 Johns. Ch. 290; *Ayers v. Baumgarten*, 15 Ill. 447.

The objectors should have brought money into court, or offered to have made an advance bid, or have guaranteed there would be no loss on resale. *Allen v. Shepard*, 87 Ill. 316; *Ayers v. Baumgarten*, 15 id. 447.

Mere dissatisfaction with a sale, or finding that other parties have overreached them, is no ground to set aside the sale. *Comstock v. Purple*, 49 Ill. 158; *Insurance Co. v. Oakley*, 9 Paige, 260; *Speck v. Pullman Palace Car Co.* 121 id. 33; *McMullen v. Gable*, 47 id. 71; *Allen v. Shepard*, 87 id. 316.

In the case at bar it can not be shown that the agreement of the purchaser to buy the complainant's claim affected the bidding or prevented competition. It merely placed the purchaser in the shoes of the complainant, and procured a bidder to bid against the other parties in interest. The affidavits

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fully show that each party was endeavoring to protect his own interest, and that Hyman used every exertion, independent of Bogue, to procure purchasers at this sale, expending large amounts of money advertising it, and casting advertisements of the sale broadcast over the land. He also bid at the sale, which shows that he did not rely on Bogue to find a purchaser. See, also, *Comstock v. Purple*, 49 Ill. 158.

The contract entered into between the complainant and Bogue was lawful, secured bidders at the sale, and was not a contract which prevented competition, and was in every respect proper. *Bradley v. Coolbaugh*, 91 Ill. 152; *Phippen v. Stickney*, 3 Metc. (Mass.) 387; *Kearney v. Taylor*, 15 How. 520; *Greenhood on Public Policy*, 180-194; *Wicker v. Hop-pock*, 6 Wall. 94; *Smull v. Jones*, 6 Watts & Sarg. 126.

Hamilton v. Hamilton, 2 Rich. 383, holds that it is proper for persons to associate in order to enable themselves to purchase.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

It will be seen from the foregoing statement, that the grounds upon which the plaintiffs in error oppose the confirmation of the master's report of sale in the Circuit Court were, that by the conduct of the receiver, Peters, and the purchaser, Bogue, they were deceived and misled to their injury; that the agreement between said receiver, and the firm of Bogue & Hoyt, together with the previous negotiations between George M. Bogue and Willard T. Block, representing the Grant Locomotive Works, were calculated to stifle bidding and prevent competition at the sale, and that the property was bid off by said Bogue at a grossly inadequate price.

The well settled rule of law in this country is, that before the approval of a judicial sale, a resale will be ordered, if fraud or misconduct in the purchaser, the officer conducting the sale, or other person connected therewith, is shown, or if

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it is made to appear that a party interested had been surprised, or led into a mistake, by the conduct of the purchaser, officer, or other person connected therewith. But courts will not refuse to confirm a judicial sale, or order a resale, on the motion of an interested party, merely to protect him against the result of his own negligence, where he is under no disability to protect his own rights at such sale.

Where a judicial sale has been conducted in the usual manner, and the purchaser is a stranger to the order of sale, mere inadequacy of price will not justify a court in vacating a sale, so as to deprive the vendee of the benefit of his purchase, unless the inadequacy is such as to amount to evidence of fraud. These principles seem to be so universally recognized by the courts of this country, that no authorities need be cited in support of either of them.

The evidence in support of and against the objections was introduced by way of affidavits. From these it appears that, upon the affirmance of the decree of sale by this court, and the overruling of the petition for a rehearing, it was understood by all parties that the master should proceed to advertise, and offer the premises for sale, as directed by the decree. The receiver, through the firm of Bogue & Hoyt, began at once to make efforts to find a purchaser, at a price which would insure a sale, and secure the payment of his claim. This was fully understood by the objectors. Mr. Paddock, one of their solicitors, in his affidavit, says that H. B. Bogue informed him on November 16, 1889, that his firm represented the interests of the complainant, with reference to the approaching sale of section 21. Henry A. Barling, in his affidavit of January 9, 1890, says, that H. B. Bogue told him that his firm had been employed to represent the interests of the complainant, and that they were about to make an effort to induce parties to bid at such sale; that he wished to know whether the sale would take place, so that he might not waste the time of his firm and of himself in the effort to procure

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purchasers under the decree. The affidavit of Robert W. Hyman Jr., shows that he also understood that George M. Bogue was acting for Peters, the receiver, in the matter of the approaching sale.

It also appears from the evidence that the firm of Bogue & Hoyt, some time prior to the sale, endeavored to sell the claim represented by the receiver, to the representatives of the Robinson estate, but they refused to purchase it, the son of Mrs. Hetty H. R. Green, who seems to have been conducting the business on her behalf, saying, "that he did not believe that \$600,000 or anywhere near that sum could be realized from the premises; that Bogue & Hoyt need not flatter themselves that the complainant would ever get a dollar out of his claim; that nothing would be paid for it by his people." It also appears from the evidence that the administrator of Hyman's estate was unable or unwilling to become a purchaser at said sale, and while he assisted in advertising the property, and made efforts to find bidders, his efforts were unavailing.

The evidence further shows, that George M. Bogue, having previously given the objectors to understand that his firm was acting for the receiver, did, on the 20th day of December, 1889, negotiate with one Willard T. Block, who represented the Grant Locomotive Works, to purchase said property for that company, and the written agreement of that date between the receiver, by his attorneys, and Bogue & Hoyt, was entered into in pursuance of such negotiation; that said Bogue bid in said property for said company, and that objectors were, at the time of the sale, ignorant of any arrangement between the receiver and said locomotive works with reference to said sale; that a few days prior to the sale, at a conference of the parties and their solicitors, it was stated by one of the solicitors for the receiver, with the assent of George M. Bogue, in substance, that the sale would take place, or that the receiver would have a bidder at the sale who would comply with the requirements of the decree. Plaintiffs in error claim, that

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the statement went farther, and that they were, in the same connection, assured that a bidder would be present who would purchase said property at a price sufficient in amount to satisfy the receiver's claim in full, under the terms of the decree.

It was admitted that all parties in interest were present at the sale, and that the representatives of both the Robinson and Hyman estates were personally solicited by the master to raise the bid of \$602,000, which they declined to do.

Each party introduced the affidavits of various real estate dealers doing business in the city of Chicago, as to the cash value of said section 21, at the date of the sale. Those on behalf of the objectors fixed the value at from \$750,000 to \$800,000. At least an equal number on behalf of the respondents swear that \$602,000 was a fair cash price, and that in their opinion, the sale was a good one. The property was extensively advertised. It is not denied that the sale was fairly conducted on the part of the master, nor is any complaint made of the conduct of the purchaser or any one else at the time of the sale. In fact objectors admit that they were content with the result, until they learned through daily papers the next day, of the transaction between the receiver and the Grant Locomotive Works.

Applying the foregoing rules of law to these facts can it be said that the Circuit Court erred in refusing to set aside said sale? Were the objectors misled, or taken by surprise, by the representations of the receiver, or of Bogue & Hoyt, his agents? It is contended that, having been led to believe that George M. Bogue was acting for the receiver, and that a bidder would be present at his instance, who would bid for said property an amount sufficient to satisfy the bank claim, he had no right thereafter to make an arrangement with the locomotive works to purchase for it, without giving notice to objectors. This contention seems to be based, in part at least, upon the assumption that there existed between the parties a trust relation, imposing upon the receiver some duty to the

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objectors in relation to the sale. This is wholly untenable. Whatever may have been the previous relations between the receiver and the Robinson estate, by the terms of the decree they were placed in antagonistic positions. Unless the receiver was able to make the premises bring at least \$600,000, all benefit of the decree in his favor would be lost, and his bill dismissed at his costs. In that event the Robinson estate would gain, by a failure to consummate the sale, all that the trustees of that estate had contended for in the protracted litigation which had gone before. While it may be true that there was no disposition to place obstructions in the way of the execution of the decree, it can scarcely be doubted, in the light of all the facts disclosed by this record, that those most directly interested in the Robinson estate, at least indulged the hope that no sale would take place. Nor can it be said that the receiver owed any duty to the Hyman estate with reference to the sale, beyond the duty of fair dealing which he owed to it and to all the other parties concerned.

Viewing the receiver then as relieved from any peculiar obligation to the other parties in interest growing out of any trust relation, was his conduct such as violated those principles of fair dealing which should obtain as between parties who are at liberty to deal with each other at arm's length? As bearing on this question the only substantial conflict in the evidence is as to whether or not objectors were informed, at the meeting of December 17, that the receiver would have a bidder at the approaching sale who would bid enough to insure the payment of his claim. In other words, whether or not, from what was said by the solicitor of the receiver, in that interview, objectors had a right to expect that the receiver, or some one in his interest, would bid a sum amounting to about \$760,000. Upon this issue of fact the clear preponderance of the evidence is against the objectors. Not only is their contention on this point directly disputed by the affidavits filed on behalf of the respondents, but it is wholly incon-

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sistent with their conduct at and immediately after the sale. If it be true, as they claim, that they had been assured that the receiver, or some one for him, would bid a sum sufficient to pay the bank claim, which would require, as we have seen, something over \$760,000, how is it possible to explain their conduct in standing by and allowing the property to be struck off for only \$602,000, without objection, and with no assertion of their alleged understanding, or attempt to bid the property up so as to compel the purchaser to pay the amount agreed upon? Instead of this, they seemed and expressed themselves as satisfied with the sale at the price bid, until they learned, on the following day, of the contract between the receiver and the Grant Locomotive Works.

But if it be admitted that, from the interview of December 17, they had a right to expect a bidder on behalf of the receiver, to the amount of more than \$760,000, how can it be said that they were misled, to their prejudice, by the fact that George M. Bogue afterwards contracted to and did bid in the property for the Grant Locomotive Works? Under the contract of December 20, Bogue & Hoyt, on behalf of the locomotive works, were bound, if necessary, to bid the property up to the very amount which they say they understood the receiver would bid. What difference could it make to them whether Bogue was bidding on behalf of the receiver or for the Grant Locomotive Works?

But is there anything in the written agreement of December 20, when viewed in the light of the attendant facts, of a fraudulent character? Peters undoubtedly had the right to use any lawful means to induce a bidder to appear at the sale and bid, in his interest. To deny him that right would be to take away from him the fruits of his successful litigation. The evidence clearly shows that the objectors understood that the sale depended upon the success of his efforts, or those of his agents, to find such a bidder. He clearly had the right to use his claim as best he could to induce a purchaser to thus bid.

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Suppose he had agreed to take \$50,000 for it, or to give time on it to a purchaser, or to sell it on any other terms favorable to a purchaser, and thereby secured a bidder. Would any one say that by so doing, he practiced a fraud upon other parties interested in said premises?

On the part of the Grant Locomotive Works, (the real purchasers of the claim and bidders at the sale,) the contract of December 20, amounted only to an agreement on their part to become a bidder at the sale, and to bid at least the required \$600,000, and after that to take chances against all other bidders, and to run the property up to \$760,912.26, if compelled to do so by competing bidders, and if it became the purchaser of the property, to take the receiver's claim at its face value. We are unable to perceive wherein such a contract tended in any way to prejudice the rights of other parties interested in the land.

But objectors say that the arrangement was secret, and designedly kept from their knowledge. It can scarcely be contended that it is the duty of a prospective bidder at a public sale, to publish his intended bid. If the terms of said contract had been made public, the representatives of the Robinson estate and the agents of Mrs. Green, who were all present at the sale, would undoubtedly have been enabled to compel the locomotive works to pay something over \$760,000 for the property, or forfeit its contract with the receiver. Such publication would doubtless have been greatly to their advantage, but it by no means follows that keeping the contract secret was a fraud upon them. It was no more a fraud than is the concealment by any bidder of the ultimate sum he will be disposed to bid, in case the property is run up by competing bidders. It is difficult to see how a public sale between competing bidders could ever be sustained, if one interested in the property sold, may insist that he was taken by surprise, and prejudiced because he had not been informed of the amount to which bidders would run the property.

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It is again urged with much earnestness, that the arrangement between the purchaser at said sale and the receiver was calculated to prevent competition in the bidding, and was therefore fraudulent. It is insisted that the evidence shows that the receiver himself, or some one in his interest, intended to bid at the sale as objectors were given to understand, on the 17th of December, and that the contract of the 20th had the effect to take him out of the list of bidders. Also that Bogue & Hoyt, who were previously engaged in trying to find a purchaser for the property, were, by that arrangement, induced to make no further efforts in that direction. In our view of the law, if the facts be conceded as they are claimed by the objectors to exist, still they establish no such fraudulent conduct in stifling bidding or preventing competition as would invalidate this sale.

Suppose it be admitted that the receiver had the ability, and had intended, if it became necessary, to bid in said property at the \$600,000, or to run it up to the full amount of his claim, and had so informed objectors. Would that in law have deprived him of the right to afterwards induce a third person to become the purchaser in his stead? Could it be said under such circumstances, that a contract by him with such third party to induce him to bid, in any way tended to prevent others from bidding? In this case it is clear that the receiver could not purchase the property, for want of legal ability as receiver, and for want of financial ability as an individual, and all parties understood that a sale of it by the master depended upon the efforts of his agents Bogue & Hoyt to find some one who would purchase it. Suppose it be admitted that on the 17th of December, Bogue & Hoyt had in mind some one who would, if necessary, become a purchaser, and that objectors were at that time so informed, might they not afterwards legally contract with the locomotive works to become the purchaser if they could do so on terms more favorable to their client? It must be borne in mind that there is an entire absence of proof in

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this record tending to show that there was any agreement whatever that the receiver or any one else should not bid at said sale. On the contrary, all that the receiver or his agents did was in the direction of procuring a purchaser for the property on the terms required by the decree, and if possible secure the payment of the bank claim in full. As to the contention that the contract with the locomotive works had the effect to induce him and his agents to cease their efforts to find other bidders, it need only be said, that having accomplished their object, no one had a right to expect further efforts from them.

The position contended for by plaintiffs in error amounts to saying that the success of the efforts of the receiver or his agents in finding a satisfactory bidder, should work its own defeat.

There is however nothing in the evidence as to what was said by the solicitor of the receiver, or Bogue & Hoyt, prior to December 20 inconsistent with the theory that their statements to the effect that the receiver would have a bidder at the sale, were made on the faith of negotiations then pending with the Grant Locomotive Works, which were consummated by the contract of December 20. Nor is there anything in either of the affidavits filed in the court below, unless it be in that of Willard T. Block, from which the slightest inference can be drawn, that the receiver or those acting for him, had at any time the remotest prospect of finding a bidder except in the locomotive works. Hamilton B. Bogue and George M. Bogue both swear that no arrangements had been concluded for a bidder until the 19th of December, and the latter says in his affidavit, that it was only because he felt assured that such arrangements would be consummated, that he authorized George W. Smith to make the statement which he did make on the 17th of December. The affidavit of Block shows that George M. Bogue had been endeavoring to induce parties who would be connected with the locomotive works to become purchasers of section 21, and while he says that Bogue informed

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him in the interview of the 20th of December that he (Bogue) would have a purchaser at the sale, unless outbid, yet we do not regard that statement, when considered in the connection in which it was made, as indicating more than that he was making efforts to obtain a bidder and expected to succeed.

After a careful consideration of all the facts proved in this case, we are convinced that the efforts of the receiver and his agents, instead of tending to prevent bidding, or to destroy competition at the sale, were calculated to and did in fact produce a purchaser. While the decree was in favor of the receiver, it imposed a heavy burden upon him, in providing that his bill should be dismissed unless the property sold for \$600,000 in cash. We have no doubt that it was through the efforts of Bogue & Hoyt on his behalf that a purchaser was obtained, nor is there room for serious doubt that, but for the contract with the Grant Locomotive Works, no responsible bidder for so large a sum would have appeared at the sale.

The point that the property sold at a grossly inadequate price is not seriously insisted upon, and could not well be under the proof. The sale was extensively advertised, a large number of responsible real estate dealers were present, the land was offered in subdivisions most likely to invite bidders. There is no proof found in the record from which it can be inferred that at another sale a greater sum could be realized. In fact, there is an absence of proof showing that it would again sell for even \$600,000.

While courts should carefully guard judicial sales, against all attempts to depreciate the value of the property sold, or to prevent full and fair competition, due regard must also be had to the policy of the law to give stability to such sales. No sufficient reason is shown in this case for disturbing the sale reported by the master, and the order of the Circuit Court confirming said sale was proper.

It is assigned for error that the court below overruled the motion of objectors for leave to place George M. Bogue and

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Willard T. Block on the witness stand and examine them orally. There was in this no departure from the usual practice in such cases. Objectors wholly failed to show that a full and fair presentation of their case could not be made in that way. But it does not appear that the objectors were in any degree prejudiced by the ruling of the court in that behalf. No attempt whatever was made to show what they expected to prove by Block in the proposed oral examination. As to said Bogue, Mr. Paddock, one of the solicitors for the objectors, in his affidavit, states as follows: "Affiant expects to prove by said Bogue, if he should be required to testify in this case, that said Bogue, prior to the date of said contract of December 20, was, to the knowledge of complainant, acting as the agent and under the direction of the parties mentioned in said letter of request, or some of them, who furnished the said Bogue the money mentioned in the said agreement of December 20, to be expended by the said Bogue in the purchase of the said land, and affiant knows of no other witness than the said Bogue by whom such facts can be adequately and fully established."

We are unable to see how such facts were material, and especially how they would, if established, have tended to sustain the objections.

Some other objections to the decree of confirmation are urged by the plaintiffs in error which we do not deem it necessary to notice further than to say, that we have examined them with care, and have reached the conclusion that none of them are well taken. The decree of the Circuit Court will be affirmed.

Decree affirmed.

EDWARD J. SCANLAN *et al.*

v.

TIMOTHY H. SCANLAN.

Filed at Ottawa October 31, 1890.

1. **MORTGAGES—deed absolute in form.** A deed absolute in form, if intended as a security, is, in equity, but a mortgage, and will be treated and enforced as such, even though the agreement for redemption rests only in parol, and notwithstanding the Statute of Frauds.

2. **SAME—mortgagor and mortgagee—dealings between them—resting the entire estate in the latter.** Where a mortgage is in the form of an absolute conveyance, a *bona fide* agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed will not be required, provided the transaction is fair, and not attended with oppression or fraud or undue influence, and the mortgagee has not availed himself of his position to obtain an advantage over the mortgagor.

3. Where a party holding the legal title of real estate as a security for loans and advances, purchases the equity of redemption of his debtor under circumstances showing no grounds for the surmise of any concealment or advantage taken of information acquired as mortgagee, and the consideration paid is an adequate one, a court of equity will not set such purchase aside.

4. **SAME—conveyance by trustee—equity of redemption reserved.** Where a trustee makes a sale of the mortgaged property to another, for the use of the former, and to cut off subsequent incumbrances and liens, with an agreement that the debtor may still redeem the property by paying the debt thereby secured, the legal effect of the trustee's deed will be merely to put the legal title in the grantee, and the equity will not be cut off, and a purchaser from the grantee in the trustee's deed, with notice of the facts, will also take subject to the right of redemption.

5. **TRUSTS AND TRUSTEES—trustee denying trust relation.** The denial by a trustee of the trust relation is a breach of trust and a flagrant fraud. It is a fraud which taints all his dealings with his *cestui que trust* made at or subsequent to the time of such denial, but it will not affect his prior acts and dealings.

6. **SAME—trustee and cestui que trust—dealings between them.** A trustee can not buy from himself, but may from his *cestui que trust*, if he so deals with him that he shakes off the obligation that attaches to him as trustee.

134	630
175	467

184	680
201	217

184	680
202	90

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7. *DOWER—release of dower—as to equity of redemption.* The wife of the owner of the equity of redemption in land, who joins in a deed by her husband made on a sale of his interest, and also in the receipt for the price, will thereby be barred of her right of dower as against the purchaser.

8. *CHANCERY—numerous defenses—should be consistent.* A defendant in chancery may set up any number of defenses, but they must be consistent with each other. Though where inconsistent defenses are interposed, and no exception is taken on that account, and on the hearing one is found to be untrue and the other established, the decree will not be reversed on account of such untrue and inconsistent defense.

APPEAL from the Appellate Court for the First District;—heard in that court on writ of error to the Circuit Court of Cook County; the Hon. LORIN C. COLLINS, Judge, presiding.

This is a bill to redeem, prosecuted by Edward J. Scanlan and Nellie Scanlan, and to which Timothy H. Scanlan and Ann Scanlan were made defendants. The bill charges, in substance, that complainants are the only children and heirs of Jeremiah Scanlan, deceased; that said Jeremiah was the owner of the premises known as No. 424 State street, Chicago, and in 1874 executed to L. C. P. Freer a trust deed thereon to secure a note for \$4000, borrowed money, and in 1875 executed to said Freer a second trust deed thereon to secure a note for \$1000, borrowed money, and in 1876 executed to said Freer a third trust deed thereon, to secure another note for \$1000, borrowed money, all of said notes drawing ten per cent interest; that said Freer, in March, 1879, he then being the real owner of all the notes, declared the \$4000 note due for default in payment of taxes and interest, made a pretended sale of the premises to his son, Nathan M. Freer, under the power contained in the first trust deed, and executed to him a pretended trustee's deed; and that there was an agreement between Jeremiah and L. C. P. Freer that the former might at any time redeem by paying the amount due on all the loans, and that Nathan M. Freer made a declaration in writing to that effect. The bill further avers, in substance, that about

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May 1, 1879, Timothy H. Scanlan, one of the defendants, agreed with Jeremiah, his brother, to advance and pay the sums of money necessary to get the title from Nathan M. Freer, and to convey to Jeremiah as soon as such advances were repaid, with interest; that on May 1, 1879, Timothy H. paid to L. C. P. Freer the sum of \$7033.56, the amount of the indebtedness to that date, as follows: \$4533.56 in cash, and \$2500 by his note of that date, due in one year, drawing seven per cent interest, and secured by trust deed on the premises, and which note he paid on October 25, 1879; that on May 1, 1879, Nathan M. Freer made to Timothy H. a quitclaim deed for the premises, and on May 2, 1879, Jeremiah Scanlan, and Ann, his wife, also made to Timothy H. a quitclaim deed for the same. The bill also charges, in substance, that the premises were, at the time of these transactions, worth \$20,000, and that Timothy H. took the same with full knowledge of the equitable rights of Jeremiah therein, and that he afterwards, and in the lifetime of Jeremiah, forcibly, and without the consent of Jeremiah, took actual possession of the land and buildings thereon, and has ever since received the rents thereof and paid the taxes out of the same. The bill claims that the deeds from L. C. P. Freer to Nathan M. Freer, and from Nathan M. Freer to Timothy H. Scanlan, did not bar the equity of redemption of Jeremiah Scanlan, but only operated to convey the legal title subject to such right of redemption, and that the quitclaim deed of May 2, 1879, was only intended as a security. The bill also states that Jeremiah Scanlan died intestate, in 1880; that the co-defendant, Ann Scanlan, is his widow; that at the time of his death the complainant Nellie Scanlan was in the nineteenth year of her age, and the complainant Edward J. Scanlan in the seventeenth year of his age, and that the complainants were ignorant of the rights and equities vested in them until they discovered the same shortly before filing the bill.

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Ann Scanlan answered the bill, admitting all its material allegations, and also filed a cross-bill, claiming that she was entitled to dower, and praying that it might be assigned to her.

The answer of Timothy H. Scanlan to the cross-bill set up the deed of May 2, 1879, in bar of dower, and also that in October of the same year Ann Scanlan executed and delivered to him "a further release and relinquishment of her inchoate right of dower," and also *laches* on her part, and that she was barred by the seven years' limitation law.

The answer of Timothy H. Scanlan to the original bill claims that he purchased the land from Nathan M. Freer in good faith, for a valuable consideration, and without notice of any legal or equitable interest of Jeremiah Scanlan therein; that L. C. P. Freer was not the owner of any of the notes in the bill mentioned, at the time he made the sale under the trust deed; that Nathan M. was then the owner of the \$4000 note, and in consideration of such sale delivered the same up to the trustee for cancellation; that he had no notice of any agreement between said L. C. P. Freer and Jeremiah that the latter might redeem after such sale, denies there was any agreement to that effect, and claims that if there was such agreement it was not in writing, as required by the statute, and was without consideration, and that he took the land without notice of any declaration of trust made by Nathan M. The answer further claims that the trustee's deed to Nathan M. was valid, and conveyed the absolute title to the property, and barred the equity of redemption; that the quitclaim deed of May 2, 1879, was not made by Jeremiah and his wife as security, but that it was made merely to confirm and ratify the deed to Nathan M. and the deed from Nathan M.; that he, defendant, did not take forcible possession of the premises, but that Jeremiah voluntarily gave up possession to him, and that he has ever since been in possession under claim of absolute ownership, and that from May 2, 1879, to the time of his death, Jeremiah never pretended or claimed that defendant held the

Statement of the case.

land in trust or as security, but recognized him as absolute owner. The answer denies that Jeremiah applied to said defendant to redeem the land, or that the latter either agreed to or did advance any money for that purpose, or that the conveyance from Nathan M. was made in pursuance of any arrangement to hold the title as security, or that he agreed to pay for Jeremiah such moneys as might be necessary to get the title and hold the same as security for advances then or thereafter made, and to reconvey the same when such advances were repaid, with interest, and claims that if any such agreement was made it was not in writing, signed by the defendant, as required by the statute, and was therefore void and of no effect. It also sets up the delays and *laches* of the complainants as a bar to the suit.

In addition to what has already been stated, the said answer contains this further matter of defense: "That at the time said lands were so conveyed by said Nathan M. Freer and Jeremiah Scanlan and wife to this defendant, the said lands were not worth to exceed \$12,000; that before this defendant had received the said quitclaim deeds from said Nathan M. Freer and J. Scanlan he had advanced to Jeremiah Scanlan, at different times, large sums of money; that this defendant did not desire to make profit of his brother's misfortune, and in the month of October had an accounting and settlement with said Jeremiah Scanlan in Chicago, and he and this defendant then and there agreed upon the value of said land at that time, and also upon the amount that this defendant had advanced to said Jeremiah Scanlan, and the interest thereon, and also the amount he had paid out in purchase of said land from said Nathan M. Freer, and also the moneys laid out by this defendant in making repairs on said land, and also the amount laid out by this defendant in paying taxes and special assessments levied on said land; and this defendant then and there paid to the said Jeremiah Scanlan the difference between the amount so paid out and advanced by him and the value

Brief for the Appellants.

of said land, as then and there agreed upon between the said Jeremiah Scanlan and this defendant, being the sum of \$2100. And this defendant, further answering, says that said Jeremiah Scanlan, and his wife, Ann Scanlan, then and there, in consideration thereof, relinquished to this defendant all claims to said land." And it also contains this further statement in respect thereto: "That in the month of October, 1879, the said Jeremiah and his wife did release and quitclaim to this defendant all their interest in said property, by writing subscribed by them, and for full consideration."

Replications were filed, and upon the hearing of the cause in the circuit court of Cook county, a decree was entered dismissing both the original bill and the cross-bill for want of equity, and that decree was afterwards affirmed by the Appellate Court for the First District, and the cause was then brought here by this appeal.

Mr. W. T. BURGESS, and Mr. JAMES E. MUNROE, for the appellants:

A trustee can not purchase at his own sale, either directly or indirectly. *Howard v. Ames*, 3 Metc. 308; *Litchfield v. Cudworth*, 15 Pick. 30; *Harper v. Ely*, 56 Ill. 179.

Appellee acquired, by the deeds from Nathan M. Freer and Jeremiah Scanlan and his wife, no different title to the land than Nathan M. Freer had, but he by those deeds became a mere trustee or mortgagee, holding the title as security for his advances for Jeremiah to L. C. P. Freer.

As to the facts tending to show the transaction a mere loan and security, see *Miller v. Thomas*, 14 Ill. 428; *Eiland v. Radford*, 7 Ala. 724; *Turnipseed v. Cunningham*, 16 id. 506; *Davis v. Stonestreet*, 4 Ind. 106; *Morris v. Nixon*, 1 How. 126.

Inadequacy of price as evidence of a loan: *Campbell v. Dearborn*, 109 Mass. 144; *Russell v. Southard*, 12 How. 139.

The fact that Jeremiah remained in possession of the property after the apparent conveyance of the title to Timothy,

Brief for the Appellants.

without paying or agreeing to pay rent, is another cogent circumstance to show the transaction a mortgage. *Campbell v. Dearborn*, 109 Mass. 145; *Flagg v. Mann*, 2 Sumner, 490; 1 Jones on Mortgages, (3d ed.) sec. 328.

Why were the evidences of Jeremiah's indebtedness delivered to Timothy, if Timothy bought absolutely? The two \$1000 notes were, as before noted, delivered to him uncanceled. This circumstance goes far to show that Timothy was a mere lender of money upon the security of the deeds made to him. *Ennor v. Thompson*, 46 Ill. 215; *Sutphen v. Cushman*, 35 id. 187.

Timothy and Jeremiah were brothers. It can not be presumed that Timothy, who before had shown a disposition to aid his needy brother, bought this property of him for less than half its value. The relationship of the parties is an additional circumstance in favor of a loan.

The transaction of October 29, 1879, did not cut off the equity of redemption of Jeremiah and his wife in the land. 1 Jones on Mortgages, sec. 251; *Peugh v. Davis*, 6 Otto, 332; *Dougherty v. McColgan*, 6 Gill & J. 282; *Linnell v. Lyford*, 72 Me. 283.

As to dealings between a trustee and *cestui que trust*, see *Thorp v. McCullum*, 1 Gilm. 626; *Michaud v. Girod*, 4 How. 556.

The relation of Timothy and Jeremiah, under the deeds of May, 1879, touching the land in question, was that of trustee and *cestui que trust*. *Babcock v. Wyman*, 19 How. 289.

The denial by a trustee of the trust relation is a breach of trust,—“a fraud of the most flagrant kind,”—and so taints with fraud all dealings with his *cestui que trust*, then or subsequent thereto, into which that denial enters. *Taylor v. Luther*, 2 Sumn. 228.

The adequacy or inadequacy of what was paid by Timothy, the trustee, to Jeremiah, the *cestui que trust*, is of no consequence, whether he makes advantage or not. If the connection (trusteeship) does not satisfactorily appear to have been

Brief for the Appellee.

dissolved, it is in the choice of the *cestui que trust* whether they will take back the property or not. *Ex parte Lacey*, 6 Ves. 625; *Morse v. Royal*, 12 id. 372; *Coles v. Trecothick*, 9 id. 234; *Ayliffe v. Murray*, 1 Atk. 58; *Downes v. Grazebrook*, 3 Mer. 201; *Brown v. Cowell*, 116 Mass. 461; *Farnam v. Brooks*, 9 Pick. 212.

Inconsistent defenses can not be set up in an answer. *Stone v. Moore*, 26 Ill. 172; *Westlake v. Horton*, 85 id. 228; *Walton v. Walton*, 70 id. 142; *Cummins v. Cummins*, 15 id. 34; *Lynn v. Lynn*, 5 Gilm. 622; 1 Daniell's Ch. Pr. 713.

MESSRS. SMITH & PENCE, and Mr. THOMAS J. WALSH, for the appellee:

In May, 1879, the \$4000 note had been canceled. By the payment made by Timothy, the two other notes, of \$1000 each, secured by the deeds of trust of 1875 and 1876, were extinguished. After that, Jeremiah was not a debtor. A subsisting debt is essential to the existence of a mortgage. *Rue v. Dole*, 107 Ill. 275.

There was no inadequacy of consideration. The price indicates neither fraud, imposition, nor undue influence. Story's Eq. Jur. secs. 244-246; *Weld v. Rees*, 48 Ill. 428; *Jenkins v. Pierce*, 98 id. 646; *Magnusson v. Williams*, 111 id. 450; Kerr on Fraud, 186; 2 Pomeroy's Eq. Jur. sec. 927; Bispham's Principles of Eq. sec. 219; *Berry v. Lovi*, 107 Ill. 612; *Henderson v. Sublett*, 21 Ala. 630.

The draft itself was sufficient to bar or to estop Jeremiah. The receipt which Mrs. Scanlan signed was sufficient to bar her dower. *West v. Reed*, 55 Ill. 242; *Seymour v. Mackay*, 126 id. 341; Rev. Stat. title "Conveyances," secs. 18, 19; Rev. Stat. title "Husband and Wife," sec. 6.

The transaction does not show that appellee held the property as a mortgagee. *Stephenson v. Thompson*, 13 Ill. 186; *Smith v. Sackett*, 15 id. 531; *Davis v. Hopkins*, 15 id. 519; *Taintor v. Keys*, 43 id. 332.

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A trustee may purchase of the *cestui que trust*, if done fairly, in good faith, and for an adequate consideration. *Brown v. Cowell*, 116 Mass. 161; *Ex parte Lacey*, 6 Ves. 625; *Ayliff v. Murray*, 2 Atk. 58; *Downes v. Grazebrook*, 3 Mer. 200; *Morse v. Royal*, 12 Ves. 355; *Coles v. Trecothick*, 9 Ves. 246.

Mr. JUSTICE BAKER delivered the opinion of the Court:

We are entirely satisfied, from the evidence in this cause, that L. C. P. Freer, the trustee in the trust deed of 1874, when he advertised and sold the premises in controversy, under the power contained therein, in fact struck off and sold the same to himself; that he was the real purchaser, and his son, Nathan M. Freer, only the nominal purchaser. It is also manifest, from the proofs, that it was intended by all parties concerned that such sale should not bar the equity of redemption owned by Jeremiah Scanlan, but that it was made simply for the purpose of freeing the equity of redemption from the liens of certain judgments that had been theretofore recovered against said Jeremiah, and that it was the understanding, both before and after the sale, that, notwithstanding such sale, and the deed made in pursuance thereof, said Jeremiah might redeem by paying the amount due upon the several notes and mortgages, together with taxes, expenses and interest. The effect, therefore, of the trustee's deed to Nathan M. Freer was merely to put the legal title in the latter, to be held under the same trusts that it was subject to while vested in the original trustee, and the equity of redemption was not cut off, but still subsisted. We furthermore think that the proofs conclusively show that the appellee, Timothy H. Scanlan, took his quitclaim deed from Nathan M. Freer, and paid the indebtedness due to L. C. P. Freer, with full knowledge of the rights and equities of his brother, Jeremiah, in the premises conveyed, and that he did so at the special instance and request of Jeremiah, and for the express purpose of affording the latter a better opportunity

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than it was feared the Freers would allow for either clearing the property from the incumbrances which were upon it, or for disposing of it in such manner as would realize a pecuniary benefit to Jeremiah over and above the incumbrances.

The fact that appellee and Jeremiah were brothers, and that the former had; a short time prior to the transactions here involved, loaned the latter \$1000 to apply on interest and taxes; the fact that immediately before the execution of the two quitclaim deeds Jeremiah had again applied to him for pecuniary assistance and for a loan, and that in response to such application he had come all the way from Galveston, Texas, to Chicago; the fact that the consideration money paid L. C. P. Freer (\$7033.56) for the conveyance from Nathan M. Freer was the exact amount due upon the incumbrances, and was grossly inadequate to the value of the land, it being admitted by appellee its value was \$12,000; the fact that the notes for \$4000, for \$1000, and for \$1000, respectively, with the trust deeds securing them, were delivered to Timothy H.; the fact that Jeremiah and his wife quitclaimed to Timothy H. without the payment of any consideration therefor; the fact that Jeremiah continued in possession of the house and premises without paying or agreeing to pay rent; and the admission of appellee, in his answer, that on October 29 following he "had an accounting and settlement with Jeremiah," that he then paid to Jeremiah and his wife \$2100, in consideration of their relinquishing to him "all claim to said land," and that they did then "release and quitclaim * * * all their interest in said property, by writing subscribed by them, and for full consideration,"—are circumstances which conclusively establish that the conveyances to appellee, although absolute upon their faces, were in fact a mortgage, and conveyed the legal title to appellee in trust, to pay out of the proceeds of the property his advances to Jeremiah and to the Freers, with interest, and account to Jeremiah for the residue, or, in case of full payment to him by Jeremiah of the amount due him, to

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reconvey to Jeremiah. A deed absolute in form, if intended as a security, is, in equity, but a mortgage, and will be treated and enforced as such, even though the agreement for redemption rests only in parol, and notwithstanding the Statute of Frauds. *Union Mutual Life Ins. Co. v. White*, 106 Ill. 67.

A defendant to a bill in chancery may set up any number of defenses in his answer, but the defenses must be consistent with each other. (*Stone v. Moore*, 26 Ill. 165; 2 Daniell's Ch. Pr. 815, 816.) The defenses here interposed by appellee to the original bill were inconsistent with each other; but then, no exceptions were filed thereto on that account. We take it, that where inconsistent defenses are set up in an answer, and such answer is not excepted to, and on the hearing one of the defenses pleaded is found to be untrue and the other is established by the proofs, the decree will not be reversed on account of the interposition of such untrue and inconsistent defense.

The denial by a trustee of the trust relation is a breach of trust and a flagrant fraud. Appellee has in his answer denied the trust relation which we find existed between himself and his deceased brother, and has sought, by pleading the Statute of Frauds, and in various other ways, to avoid the consequences of the existence of such relation. By falsely claiming he was not a mortgagee or trustee he has undoubtedly placed himself in an unenviable attitude, and one which has a tendency to justly arouse the suspicions of the court in respect to the merits of his case. We find, however, in the record, no evidence which would justify the conclusion, or even a reasonable suspicion, that appellee ever denied he was mortgagee or trustee, prior to the time he conceived it was expedient so to do in defense of this suit. In fact, the evidence tends strongly to show that he recognized and admitted the existence of an equity of redemption in his brother until after the arrangement of October 29, 1879, hereinafter mentioned. We understand the doctrine to be, that the denial by a trustee of the trust relation is a fraud, which taints with fraud all his deal-

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ings with his *cestui que trust* which transpire at the time of such denial or subsequent thereto, and into which such denial enters. (*Taylor v. Luther*, 2 Sumn. 228.) But we can not see how a fraudulent denial, made after the institution of this suit in 1887, could possibly enter as an element into a settlement and arrangement made in 1879, and fully completed and carried into effect at that time.

Did appellee, on or about October 29, 1879, purchase from Jeremiah Scanlan his equity of redemption, and if so, was the arrangement then made such, that in view of the relations then existing between them it should be regarded as valid and binding upon said Jeremiah and his heirs?

In respect to the question of fact involved, we have no doubt, from the evidence, but that appellee bought and paid for the equity of redemption. The testimony of Albert Archer and others shows that in the summer and fall of 1879 Jeremiah was in poor health and in straightened circumstances, and was anxious to sell and dispose of the property. The testimony of Nathan M. Freer shows that on October 29, 1879, appellee was in Chicago, and came with Jeremiah to his office, and that he, at their request, drew a paper in the nature of a receipt for a settlement; that Jeremiah signed it there, and that it was taken by one of them for the purpose of getting Mrs. Scanlan to sign it. The testimony of Marcus Stearns shows that he presented the paper to Mrs. Ann Scanlan, and that she signed it, and that thereupon he handed her a piece of New York exchange. The testimony of appellee shows that said paper was destroyed by fire in 1882, and that it was a receipt, signed by Jeremiah and Ann Scanlan, for \$2100, in full of all claims against the property. The New York draft, which is in evidence, shows that it was made payable, by the indorsement of T. H. Scanlan, to the order of Jeremiah Scanlan, and that it was by Jeremiah indorsed to J. M. Adsit, banker, and by Adsit collected through the National Park Bank. The testimony of Morris Salkey shows that he was tenant of a por-

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tion of the building on the land, and that Jeremiah introduced Timothy H. to him as the owner of the building. The testimony of Patrick Nolan and of Kate Scanlan shows that Jeremiah told them he had sold the property to appellee. And the testimony of Daniel T. and Clement J. Kinsella shows that they, as the agents of appellee, collected rents for the premises from January, 1880.

In respect to the rule which obtains in the matter of a purchase by a trustee, we understand it to be this: that a trustee can not buy from himself, but that he may buy from his *cestui que trust*, provided that he so deals with the *cestui que trust* that he shakes off the obligation which attaches to him as trustee. *Fox v. Macreth*, 1 Lead. Cases in Eq. (4th Am. ed.) 188, and cases cited in notes; *Ex parte Lacey*, 6 Ves. 625.

In *West et al. v. Reed*, 55 Ill. 242, it was held, that while contracts between mortgagor and mortgagee for the purchase or extinguishment of the equity of redemption are regarded with jealousy by courts of equity, and will be set aside if the mortgagee has in any way availed himself of his position to obtain an advantage over the mortgagor, yet this principle does not preclude any *bona fide* agreement between the parties which should operate to vest the entire estate in the premises in the mortgagee, and that mere inadequacy of consideration will not, of itself, deprive such agreement of its binding effect. In that case, however, while the conveyance from the mortgagor was an absolute deed, yet the assignor of West had executed to the mortgagor a separate instrument of defeasance, while here the defeasance rested solely in parol, and without any writing to show it. So we think a somewhat stricter rule should be here applied, as against the mortgagee and trustee, than was held in *West v. Reed*. Here, the mortgagor is dead and the mortgagee is not a competent witness; but, as we have already stated, the circumstances in evidence indicate that the mortgagee, at the date of the transaction, fully admitted the equitable rights of the mortgagor. It is also mani-

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fest that the mortgagor, who was living upon the premises, knew much better than the mortgagee, who was a resident of a distant State, the value of the property. There is no ground, then, for any surmise that there was any concealment, or advantage taken of information acquired in the character of trustee. The only room there was for fraud was that appellee repudiated the position of mortgagee, and thereby fraudulently forced his brother to a settlement on his own terms. If the price given was inadequate, it might afford occasion for a claim such was the case. But we do not find that there is evidence to reasonably justify a conclusion the price was inadequate. Jeremiah himself knew better than any one else the value of the premises, and he was, in the summer or early fall, entirely willing they should be sold for \$11,500, subject to the State street assessment and the taxes of 1879. L. C. P. Freer, whose only security for some \$7000 was his liens on the property, considered it then worth about \$12,000, and "possibly a little more." George M. Bogue places the then value at \$12,400. J. H. Gray, agreeing with all the other witnesses except Kerfoot, values the land at \$300 a foot. Archer offered \$11,500, and considered it a bargain, but expected to pay, in addition, the taxes and assessments, making a total of \$12,639. S. H. Kerfoot makes the valuation altogether higher than the other witnesses do. He bases his opinion upon an examination made in 1888, and thinks the land was in 1879 worth \$350 per foot, and the buildings worth \$10,000, making a total of \$18,025. The weight of the evidence, as a whole, would put the then value at some \$12,500. The amounts settled by appellee with Freer, the taxes and assessments paid and assumed, the amount paid for finishing the upper floor, the \$1000 loaned to Jeremiah, and the draft for \$2100, form an aggregate of \$11,974.26 that the property cost appellee. The borrowed moneys which he paid Freer were drawing ten per cent interest, and it is not unlikely the arrangement between the brothers was, that the amounts paid in cash by appellee

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should bear the same rate of interest, and if so, the interest to October 29 would make some \$450 more, making the aggregate consideration less than \$100 below the value of the property. Besides this, appellee was at the trouble and expense of two trips from Galveston, Texas, to Chicago, in looking after the property, and it is quite likely the arrangement, in the first instance, was, that he should receive some compensation for his trouble and expenses. It must also be borne in mind, that the parties made no record of the details of their settlement, and neither of them can testify in respect thereto, and that this suit was not brought until some eight years thereafter.

After the settlement, Jeremiah informed Nolan, who was an old and intimate friend, that his brother had given him \$500 more for the property than anybody else would give. Archer had offered, including taxes and assessments, the sum of \$12,639, and \$500 additional to this would make the consideration \$13,139. This would indicate there was about \$700 of consideration that entered into the accounting that is not identified by the testimony, and in what it consisted it is not possible, owing to the death of Jeremiah, now to ascertain. The evidence shows that in 1879, and prior thereto, there was but little demand for State street property in the vicinity of No. 424, and that it was depressed in value, but that since then it has very greatly increased in value. After a careful examination of all the testimony, and after giving due weight to the fact appellee was a mortgagee and trustee, and his conduct therefore to be regarded with jealous scrutiny, we are of opinion we could not, under all the circumstances of the case, fairly and reasonably say that the consideration for the equity of redemption was inadequate, or justly impute fraud to him. Here there was no marked under-valuation of the property, but, on the contrary thereof, the consideration would be deemed reasonable if the transaction had been between other parties.

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Two other circumstances are relied upon by appellants as warranting an imputation of fraud and compulsion. One of them is, that both of the parties, in the correspondence which passed between them, referred to the transaction of May, 1879, as a *purchase* by appellee of the property, instead of designating it as a mortgage thereof to him; and the other is, that appellee, before he left his home in Texas, made up his mind just how much he would give for the equity of redemption, as indicated by his then purchasing New York exchange for \$2100. In respect to the first of these circumstances it may be said, it was the most natural thing in the world for the brothers to speak of the transactions of May, wherein absolute deeds were made to appellee, as a purchase, and it would be far-fetched and unreasonable to deduce therefrom an imputation of fraudulent intent. In respect to the other, it is of more weight; but in view of the facts that Jeremiah was willing to close out the property upon the offer made by Archer, that frequent letters passed between Jeremiah and appellee, and the latter presumably knew of such offer, and also knew of the state of accounts between himself and Jeremiah, and that appellee admittedly gave \$500 more than Archer would give, we think the circumstance in question would not indicate fraud or duress, but rather a willingness to give more for the equity than could be procured from others. The jealousy with which transactions between mortgagor and mortgagee, or trustee and *cestui que trust*, are regarded, should not be extended beyond the bounds of reason, and so as to unnecessarily and unjustly interfere with the common business transactions of men.

Where a mortgage is in the form of an absolute conveyance, a *bona fide* agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed will not be required, provided the transaction is fair, and not attended with oppression or fraud or undue influence, and the mortgagee has not availed himself of his position to obtain an advantage over the mortgagor. *West v.*

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Reed, 55 Ill. 242; *Carpenter v. Carpenter*, 70 id. 457; *Seymour v. Mackay*, 126 id. 341.

Although we would be better satisfied with the result if appellee had not denied in his answer (which, however, the oath being waived, was a mere pleading,) that he was mortgagee and trustee, and if there was within reach positive evidence of just what the amount of the consideration agreed upon was, and an itemized statement showing with exactness how it was settled for in the accounting, yet we do not feel that sufficient appears in this record to justify us in upsetting the conclusion reached by the courts below. The circumstance that Jeremiah did not in his lifetime seek to impeach the settlement, and the further circumstance that appellants made no complaint until nearly seven years after his death, and until the property had very greatly increased in value, are also entitled to some weight.

In respect to the cross-bill of Ann Scanlan, suffice it to say, that she waived her right of dower when she joined in the execution of the deed of May 2, 1879; that notwithstanding her denial, it sufficiently appears from the testimony of Nathan M. Freer, Marcus J. Stearns, and the receipt which she signed, and her subsequent conduct, that she released her inchoate right of dower in the equity of redemption, and that the consideration therefor was included in the draft which was made payable by indorsement to her husband.

In view of all the circumstances of the case we think it would be inequitable to allow a redemption from the mortgage.

The judgment of the Appellate Court, and the decree of the circuit court dismissing the original bill and the cross-bill, are affirmed.

Judgment affirmed.

Syllabus.

ALBERT KITTERLIN, for use of Swan Swanson,

v.

THE MILWAUKEE MECHANIC'S MUTUAL INSURANCE COMPANY.

Filed at Mt. Vernon November 5, 1890.

1. **HOMESTEAD**—*prior to the act of 1873—nature of the right.* Prior to the going into effect of the act of 1873, the right of homestead was a mere exemption, and when the householder, in whom the exemption existed, conveyed without the formal waiver of the homestead, the effect was to transfer his title to the land, but so far as it affected the homestead right, the operation of the deed was suspended until the exemption was extinguished.

2. **SAME**—*since the act of 1873—character of the interest in the householder.* But by the act of 1873 the householder became invested with an estate in the land, measured and defined by the value, and not by the extent or quantity, of his interest in the land or lot. And when the interest of the householder in the premises, whether in fee, for life or for years, does not exceed \$1000 in value, the homestead estate comprises and embraces his entire title and interest, leaving no separate interest in him to which liens can attach or which he can alien, distinct from the estate of homestead.

3. The estate of homestead thus created is based upon the title of the householder, and can have no separate existence independently from the title, which constitutes one of its essential elements and from which it is inseparable.

4. **SAME**—*upon the death of a householder—upon whom the estate devolves.* Upon the death of the householder in whom the estate of homestead is primarily vested, the estate, by operation of law, devolves upon the surviving husband or wife, for his or her life, and upon the children of the householder during the minority of the youngest; and the heir-at-law takes a reversionary interest, only, expectant upon the termination of the estate for life and for years created by the statute.

5. **SAME**—*limitation of value—as affecting the character of interest.* Where the value of the property to which the estate attaches is more than \$1000, the excess is unaffected by the estate; but when its value does not exceed that sum, the whole interest of the householder is comprised within the estate of homestead.

6. **SAME**—*release of homestead—what will so operate.* Where the homestead premises are of less value than \$1000, a conveyance effectual to convey any interest in the land must of necessity be sufficient to operate as a relinquishment of the homestead.

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7. **SAME**—conveyance of homestead—the wife must join—even if the conveyance is to her. The statute which declares that no conveyance of the homestead shall be valid unless the same is in writing, subscribed by the householder and his wife, if he has one, applies to deeds made by householders to their wives. Therefore, a conveyance of the homestead, not exceeding \$1000 in value, by a householder to his wife, she not joining therein and acknowledging the same, is void, and passes no title.

WRIT OF ERROR to the Appellate Court for the Fourth District;—heard in that court on writ of error to the Circuit Court of Effingham county; the Hon. WM. C. JONES, Judge, presiding.

Messrs. Wood Bros., for the plaintiff in error:

The only question here is, whether a conveyance by a husband to his wife of a homestead of less value than \$1000 will transfer the husband's title to the wife, and on this point see Thompson on Homesteads, 473; *Richl v. Bingenheimer*, 28 Wis. 84; *Hoyt v. Howe*, 3 id. 752; *Murphy v. Crouch*, 24 id. 365; Bigelow on Estoppel, 285, 283; *Irwin v. Mills*, 41 Texas, 310; *Gould v. West*, 32 id. 352; *Patterson v. Kreig*, 29 Ill. 519; *Conner v. McMurtry*, 2 Allen, 202; *Richards v. Chase*, 2 Gray, 384; *Castle v. Palmer*, 6 Allen, 403; Martindale on Conveyancing, 157; *Silloway v. Brown*, 12 id. 32.

Mr. S. F. GILMORE, for the defendant in error:

The transfer of the title to the property avoided the policy. *Dix v. Insurance Co.* 22 Ill. 272; *Insurance Co. v. Hauslen*, 60 id. 522; *Hathaway v. Insurance Co.* 64 Iowa, 227; *Savage v. Insurance Co.* 52 N. Y. 502; *Oakes v. Insurance Co.* 131 Mass. 164; *Longdon v. Farmers' Association*, 22 Minn. 193.

The deed of Kitterlin to his wife passed the title. *Eldridge v. Pierce*, 90 Ill. 481.

Per CURIAM: On November 12, 1883, the defendant in error issued its policy of insurance for \$1200 upon the two-story frame building of the plaintiff, Kitterlin, situated upon lots 1 and 2, block 9, in the town of Deitrich, to continue for one

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year. At the time of the insurance the title was in Kitterlin, and while he used one room in carrying on a small mercantile business, the house was occupied by him and his family as a residence, and the lot on which it was built constituted their homestead. On the 27th of December, 1883, Kitterlin, joined by his wife, executed a mortgage on the insured premises, securing the payment of \$950, to Swan Swanson, and the insurance company, with notice thereof, stipulated that the insurance, if loss occurred, should be payable to Swanson, as his interest might appear. This policy was renewed November 11, 1884, for another year, and on January 9, 1885, Kitterlin executed, acknowledged and delivered a deed of general warranty to his wife, Amelia Kitterlin, purporting to convey said homestead, without the consent of the insurance company having been obtained. It was agreed and stipulated in the policy that the insurance thereby effected should cease, and the policy be wholly void, if the property was sold or transferred, or if any change should take place in the title to or in the use or occupation of the premises by the act of the assured, without the consent of the company endorsed on the policy. The building was destroyed by fire June 2, 1885. Suit was brought on the policy, for the use of Swanson, the mortgagee, and a judgment rendered against the insurance company for \$925. On appeal to the Appellate Court for the Fourth District this judgment was reversed, without remanding the cause, and the case comes to this court on certificate of importance made by the Appellate Court, under the statute.

Three grounds of defense were insisted upon: First, that the fire was incendiary, by the act or procurement of the assured; second, there was a change in the use and occupation of the premises; and third, that there had been a change of title prior to the alleged loss, in violation of the express condition of the policy, whereby it became void, etc.

In respect of the two defenses first mentioned it is manifest the Appellate Court found as did the trial court. As to the

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first no question of law was raised, and in respect to the second the Appellate Court found that there was no change of the use or occupation of the premises such as would avoid the policy, and in this we concur.

The Appellate Court certify to this court the question of importance involved, as being, "whether or not a conveyance of a homestead of less value than \$1000, by a husband to his wife, is void, under the statute providing that no release or conveyance thereof shall be valid unless in writing, subscribed by the householder and his or her wife or husband, if he or she have one; and whether in this case there was such a transfer of title as rendered the policy sued on void, under its provisions." It is clear, from the record, that the trial and Appellate courts each found the value of the premises of which the homestead consisted, to be \$1000 or less. Therefore, the the only question presented for our consideration is, whether a deed from the husband to the wife, purporting to convey a homestead of the value of \$1000, only, would effect a change of title within the meaning of the conditions of this policy.

It will not be necessary to discuss or determine what change will operate as a forfeiture of the insurance, or whether, conceding the conveyance to be valid for any purpose, there did not devolve, by operation of law, upon the husband, an insurable interest in expectancy, (Wood on Insurance, 331,) which the policy would be operative to protect, but may at once proceed to the question whether any change was effected in the title by the deed from the husband to the wife.

The attempted conveyance of the homestead by the husband, since the passage of the Homestead act now in force, without the signature and acknowledgment of the wife, when the grant was to others than the wife, has been repeatedly held by this court to be invalid, and ineffectual to convey title. (*Eldridge v. Pierce et al.* 90 Ill. 474; *Browning v. Harris*, 99 id. 456; *Hartman et al. v. Schultz et al.* 101 id. 437; *McMahill et al. v. McMahill et al.* 105 id. 596.) But it is said

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that the provision of the statute rendering invalid conveyances of the homestead without the wife joins in the execution and acknowledgment of the deed, is for the benefit of the wife, and the purpose of the statute is accomplished when the conveyance is made to her, and that therefore her signature and acknowledgment are not essential to the validity of this conveyance; and since husband and wife may contract by deed, the title to the homestead premises became vested in the wife, subject only to the husband's inchoate right of dower, and of homestead, as survivor. We are unable to concur in this view, although we are referred to the decisions of courts of great respectability, which, in construing the statutes of the States where rendered, seem to so hold.

Prior to the act of 1873 going into force, the right of homestead was a mere exemption, and when the householder, in whom such exemption existed, conveyed without the formal waiver of the homestead, the effect was to transfer his title to the land; but so far as it affected the right of homestead, the operation of the deed was suspended until the exemption was extinguished in some of the modes recognized by the statute. *McDonald v. Crandall*, 43 Ill. 231; *Coe et al. v. Smith*, 47 id. 225; *Hartwell v. McDonald*, 69 id. 293; *Eldridge v. Pierce et al. supra*.

The statute of Wisconsin, under which *Reihl v. Bingenheimer*, 28 Wis. 84, the principal case relied upon by appellee, was decided, had been similarly construed by the Supreme Court of that State. In *Hoyt v. Howe*, 3 Wis. 752, it was held a judgment became a lien upon the homestead premises, binding the property and securing priority over other creditors, but was postponed until the homestead was extinguished, when the property became liable to sale. There, as under prior statutes in this State, the fee or other title of the householder was severable from the homestead estate, and it might well be that an alienation by the fee owner would convey the title, even to a stranger, subject to the right of occupancy of

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the premises under the statute. The Michigan case referred to, (*Stevens v. Castel*, 63 Mich. 111,) follows the Wisconsin case, and presumably was based upon a similar statute. We do not regard *Irons v. Mills et al.* 41 Tex. 310, as in point.

The requirement of the statute that the wife should join in the deed, related to the release and waiver of the homestead exemption, and that would continue whether the fee was vested in the husband or wife; and it might well be held, that where the object of the parties was to vest the fee in the wife, and such would be the effect of the deed, her failure to waive or release the mere exemption from levy and forced sale of the homestead would not defeat her title. But by the act of 1873 a radical change was wrought in the quality of the holding by the householder. By that act he became invested with an estate in the land, measured and defined by the value, and not by the extent or quantity, of his interest in the land or lot. And when the interest of the householder in the premises, whether it be in fee, for life or for years, does not exceed \$1000 in value, the homestead estate comprises and embraces his entire title and interest, "leaving no separate interest in him to which liens can attach, or which he can alien, distinct from the estate of homestead." (*Eldridge v. Pierce*, *Browning v. Harris*, and *Hartman et al. v. Schultz*, *supra*.) The estate of homestead thus created is based upon the title of the householder, and can have no separate existence independently of the title, which constitutes one of its essential elements, and from which it is inseparable. Upon the death of the householder, in whom the estate of homestead is primarily vested, the estate, by operation of law, devolves upon the surviving husband and wife for his or her life, and upon the children of the householder during the minority of the youngest thereof, and the heir-at-law takes a reversionary interest, only, expectant upon the termination of the estate for life and for years created by the statute. When the value of the property to which the estate attaches is more than \$1000, the excess is

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unaffected by the estate; but when its value is \$1000 or less, the whole interest of the householder is comprised within the estate of homestead. This construction was given to the statute in *Eldridge v. Pierce et al. supra*, and has been repeatedly reaffirmed in subsequent cases. It follows, that when the premises are of less value than \$1000, a conveyance effectual to convey any interest in the land in which the estate exists, must of necessity be sufficient to operate as a relinquishment of the homestead. Nothing passes by a deed thereof unless the homestead estate passes or is relinquished. Was the deed of Kitterlin a valid conveyance of his interest in the land in question, including the homestead estate?

The first section of the act, after creating the estate, provides: "And such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." We must then look further into the act to determine when conveyance of the estate may be made. The fourth section provides the mode of relinquishment of the estate, and the estate having been exempted from the laws of conveyance, except as provided in that act, we must look to that section for authority for its conveyance. It reads as follows: "No release, waiver or conveyance of the estate so exempted shall be valid unless the same is in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or possession is abandoned or given pursuant to the conveyance, or if the exemption is continued to a child or children, without the order of the court directing a release thereof."

As before said, the controversy here relates solely to the validity of the deed from Kitterlin to his wife, and whether the title to the insured premises was thereby changed, in violation of the stipulation of the policy. It would seem that the lan-

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guage of the statute is plain and without ambiguity, that no conveyance of the homestead should be valid unless the same was in writing, subscribed by the householder *and his wife*, if he have one. The obvious intention of the legislature was to remedy the inconveniences and defects existing in the prior homestead exemption acts, not only by changing the mere exemption into an estate in the land, but also by controlling and regulating the manner of its alienation and relinquishment. We said in *Browning et al. v. Harris et al. supra*: "Since the homestead, in such a case, (where the total value does not exceed \$1000,) comprises the entire interest, (of the householder in the premises,) it follows that any conveyance by the owner which does not conform to the requirements of the statute with respect to the conveyance of homesteads will be inoperative and void as to such homestead." And it was further said: "The legislature having, in plain and unmistakable terms, declared that certain forms and ceremonies shall be observed in the conveyance of a homestead, courts have no power to dispense with them. On the contrary, it is their manifest duty to enforce their observance."

The legislature, in creating this estate, have expressly exempted it from the laws of conveyance, etc., except as is provided in and by the act by which it is created, and by that act have made the forms there prescribed essential to its conveyance and relinquishment, and have expressly declared that no conveyance, etc., of the homestead, shall be valid without compliance therewith. Here, the conveyance is not subscribed by the wife of the grantor, nor acknowledged by her, in conformity with 27th section of the Conveyance act, or "in the same manner as conveyances of real estate are required to be acknowledged," each of which is by the statute made essential to the validity of any conveyance of the homestead estate. For wise and humane reasons,—to preserve to the debtor and his family a home and shelter,—the estate is, by express enactment, secured to the husband and wife, and no waiver, release

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or conveyance of it can be valid that is not, by their joint voluntary act and consent, expressed in the manner and form prescribed in the statute. We are not at liberty to defeat, by construction, the plain and clearly expressed will of the legislature, nor to dispense with the safeguards it has provided against the improvident alienation or relinquishment of the estate. The husband, who is the owner of the title to which the homestead attaches, can not, by any act of his own, waive, release, relinquish or convey the homestead. Unless abandoned, or aliened or released by the joint act of himself and wife, in the mode prescribed, it continues, despite any act or deed of his, for the benefit of himself and family during his life, and for their benefit after his decease. Nor does it affect this conclusion that the children of the householder can not be said to have a vested interest in the estate during his life. True, the interest of the children is under the control of the parents, and may be defeated by them before vesting in the children; but it can only be done in some one of the modes prescribed by the statute. Nor does it affect this consideration that the conveyance is, here, to the wife. It frequently happens that such a conveyance would, if valid, effectually defeat the right of homestead in the children. In *Capek v. Kropik*, 129 Ill. 509, the wife was the owner of a portion of the premises comprising the homestead, and died leaving her husband, and children by a former marriage, surviving her. We held that her children were entitled to homestead jointly with the surviving husband, although he did not stand *in loco parentis* to them. *Kingman v. Higgins*, 100 Ill. 319; *Merritt v. Merritt*, 97 id. 243.

But it is unnecessary to pursue the discussion further. The legislature have said, in unambiguous language, that such deeds are without validity. The premises, or any interest in them, being incapable of severance from the estate of homestead therein, and the deed from Kitterlin to his wife being without validity as a conveyance of the homestead estate,

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effected no change in the title. Being void, the title of Kitterlin was unaffected thereby.

It follows, that we are of opinion that there was no change of title, within the meaning of the policy of insurance, and that the Appellate Court erred in reversing the judgment of the circuit court. The judgment of the Appellate Court will accordingly be reversed and that of the circuit court affirmed.

Judgment reversed.

Mr. JUSTICE WILKIN took no part in the case, having been a member of the Appellate Court for the Fourth District when the case was decided in that court.

THE LOUISVILLE AND NASHVILLE RAILROAD COMPANY *et al.*

v.

THE CITY OF EAST ST. LOUIS.

Filed at Mt. Vernon November 22, 1890.

1. SPECIAL ASSESSMENTS—*local improvement—what to be so considered—who shall determine.* The statute does not define what shall be considered a local improvement. That question is left solely to the determination of the city councils or village boards. Their decision as to the utility of an improvement upon streets, and whether it is to be treated as a local improvement for the purpose of raising funds by special assessments to pay for it, is final, in the absence of fraud.

2. A street improvement may be treated as a local improvement, and paid for by special assessments, although it may not benefit abutting property. A special assessment may be made on property benefited by the improvement, whether it is abutting and contiguous to the improvement or not. The question in every case is, will the property assessed be specially benefited by the proposed improvement.

3. SAME—for viaduct in a public street. A city council has the power, under section 62, article 5, chapter 24, of the Revised Statutes, to construct a viaduct in a public street by special assessment.

4. The fact that a viaduct over railway tracks in the street is proposed to be extended across a creek, will not necessarily render a proceeding to build the same by special assessment invalid. In this case,

134	656
144	578
124	644
147	112
134	656
149	313
150	89
150	631
154	162
155	267
134	656
168	45
134	656
168	62
134	656
169	164
170	353
170	441
134	656
180	204
134	656
183	79

134	656
210	426
e210	427
210	428
210	429

Syllabus.

in determining to construct a viaduct in a street over certain railway tracks, it was found impossible to construct such way, with a proper approach, without extending the structure across a creek near by; and it appeared that the cost of a suitable viaduct at that place would not be increased by reason of its extension over the creek. The improvement as so proposed to be made, might well be the basis of a special assessment.

5. *SAME—description of improvement—by reference in ordinance to plans, etc.* An ordinance for a local public improvement may refer to plans, profiles and specifications attached thereto, for a more full and complete description of the nature, kind and character of the proposed work.

6. *SAME—benefits—to be assessed against property—not persons.* Property can be assessed for public improvements on the principle of benefits conferred on it,—and not on its owner generally; and it must appear from the proceedings that the assessment is made upon this principle.

7. *SAME—what subject to special assessment—right of way under mere license.* A mere contract right in one railroad company to run its trains over the track of another company, the right being held subject to being determined upon notice, does not invest the former company with such ownership in the right of way as can be subjected to special assessment.

8. *SAME—benefits—in the case of several parcels—assessment to be several—not in gross.* The statute (Rev. Stat. chap. 24, art. 9, sec. 140,) requires the commissioners, in making their assessment roll, to give a description therein "of each lot, block, tract or parcel of land, and the amount assessed as special benefits thereto." If the benefits are assessed in gross on several tracts or lots, this will invalidate the report, and render the assessment roll liable to objection when offered in evidence.

9. Commissioners appointed to assess the benefits to accrue from the construction of a viaduct in a public street, assessed to a railway company "part of blocks 8 and 9, and right of way across Broadway." The blocks consisted of lots. On application to confirm the assessment, the report of the commissioners showing the assessments was offered in evidence, and objected to on the ground the benefits had not been assessed to each of the lots and right of way separately: *Held*, that the objection was well taken.

10. *STATUTES—repeal by substituting new section.* An amendment of a section of a statute by the substitution of a distinct and complete section operates as a repeal of the section so amended.

11. *SAME—amendment of a repealed section is void.* A statute purporting to amend a section of a prior act after its repeal, is invalid and abortive. A law not in existence is not the subject of amendment.

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APPEAL from the County Court of St. Clair county; the Hon. JOHN B. HAY, Judge, presiding.

Messrs. LANSDEN & LEEK, and Mr. J. M. FREELS, for the appellants:

The ordinance for the proposed viaduct is void, for the reason the owners of property on the street failed to petition for the improvement. See act of 1889, amending act of 1872.

The ordinance must definitely specify the nature, character, locality and description of the contemplated improvements, or the court will have no authority to confirm the assessments. *Levy v. City of Chicago*, 113 Ill. 650; *City of Sterling v. Galt*, 117 id. 11; *Village of Hyde Park v. Spencer*, 118 id. 446; *City of Kankakee v. Potter*, 119 id. 324; *Ogden v. Town of Lake View*, 121 id. 422.

Mr. J. M. HAMILL, for the appellant the Louisville and Nashville Railroad Company.

Messrs. G. & G. A. KOERNER, for the appellant the Illinois and St. Louis Railroad and Coal Company.

Messrs. CONKLING & GROUT, for the appellee:

The right of way in a street is an interest in realty, and subject to assessment, either for special or general purposes. *Welty on Assessments*, 361; *Washburn on Easements*, par. 5, sec. 5; *Chicago v. Baer*, 41 Ill. 312; *Parmelee v. Chicago*, 60 id. 267; *City Railway Co. v. Chicago*, 90 id. 575; *Railway Co. v. People*, 120 id. 106.

Mr. F. G. COCKRELL, also for the appellee.

Mr. JUSTICE WILKIN delivered the opinion of the Court:

Broadway, in East St. Louis, runs east and west, crossing Cahokia creek. The street is crossed by several railroad tracks, immediately east of the creek. In July, 1889, the city council

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passed an ordinance for the construction of a viaduct over these tracks, which was also to span the creek. It was provided by the ordinance, that this viaduct should be paid for by a special assessment upon the property benefited thereby, to the amount that the same could be legally assessed, and the balance by general taxation. The cost was estimated to be \$55,000. The commissioners appointed to make the assessment, assessed benefits as follows:

Name of Owner.	Part of Lot or Land.	Sub-lot.	Lot.	Block	Assessment.	
					Dollars.	Cts.
Louisv. & Nashville R. R. Co.	—Part of blocks 8 and 9, and right of way across Broadway				16,500	.....
C., C., C. & I. R. R. Co.....	—Right of way across Broadway				11,550	.....
East St. L. & C. R. R. Co.....	—Right of way across Broadway				7,150	.....
St. Louis, Alton & Terre Haute R. R. Co.....	—Part of surveys 127-128 betw. blocks 8 and 9, on the N.W. and blocks 7 & 10½ on the S.E. and right of way across Broadway				6,050	.....
Ill. & St. L. R. R. & Coal Co....	—10 ft. off northerly side of alley N. of block 10½, and right of way across Broadway				5,500	.....
Mobile & Ohio R. R. Co.....	—Right of way across Broadway				4,400	.....
St. Louis Bridge Co.....	—Right of way across Broadway				2,750	.....
City of East St. Louis.....	.....				1,100	.....
					\$55,000	.....

On application to the county court of St. Clair county, at its November term, 1889, for the confirmation of this assessment, each of the above named railroad companies filed objec-

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tions. The case was heard at the following February term, a jury being waived. The court found the cost of the viaduct to have been over-estimated \$10,000, and modified the assessment roll, by reducing each assessment, and the amount set down against the city, a proportionate part of said over-estimate, thus making the amount assessed to the—

Louisville & Nashville R. R. Co.	-	-	-	-	\$13,500
C., C., C. & I. R. R. Co.	-	-	-	-	9,450
East St. Louis & Carondelet R. R. Co.	-	-	-	-	5,850
St. Louis, Alton & Terre Haute R. R. Co.	-	-	-	-	4,950
Illinois and St. L. R. R. and Coal Co.	-	-	-	-	4,500
Mobile & Ohio R. R. Co.	-	-	-	-	3,600
St. Louis Bridge Co.	-	-	-	-	2,250
City of East St. Louis.	-	-	-	-	900

The objections were thereupon overruled, and the assessment confirmed as modified. The Louisville and Nashville Railroad Company, the Illinois and St. Louis Railroad and Coal Company, the Mobile and Ohio Railroad Company, and the C., C., C. and I. Railroad Company, appealed, but the last named company assigns no errors. Three objections are urged here by each of the other appellants, going to the validity of said ordinance, viz: First, the improvement was not petitioned for by the owners of abutting property; second, the nature, character and description of the improvement is not sufficiently described; and third, the improvement described therein is not a local improvement, within the meaning of the statute authorizing the levy of special assessments.

The first objection is based on the amendment to article 9, chapter 24, section 19, of the act of 1872, passed June 1, 1889. (Laws of 1889, p. 87.) It is insisted that the proviso in this amendment is a limitation upon the power of city councils or boards of trustees to pass an ordinance for local improvements. We do not assent to this view. The amendment of 1889 is, however, invalid. It purports to be an amendment to section

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19, etc., of an act entitled "An act to provide for the incorporation of cities and villages," *approved April 10, 1872, in force July 1, 1872*. That section had been previously amended by the enactment of a distinct and complete section in 1887. (Laws of 1887, p. 107.) This amendment operated as a repeal of the act of 1872. (*People v. Young*, 38 Ill. 490.) Therefore, when the amendment of 1889 was passed, section 19 of the act of 1872 was not in existence, and was not the subject of amendment.

This view also disposes of the second objection to the ordinance. For the "nature, character, locality and description of the improvement," the ordinance refers to plans, profiles and specifications attached to it, and duplicate copies of which were stated in the ordinance to be on file in the city engineer's office of said city. It is not claimed that the description, by these plans, profiles and specifications, is not full and complete, but it is said they are no part of the ordinance,—that the amendment of 1889, like the original act of 1872, requires the description to be embodied in the ordinance, and therefore a mere reference to plans, etc., is not sufficient. We have seen, however, that the amendment of 1889 is void, and did not repeal that of 1887. The latter, therefore, remains in full force. By its express language a reference to plans, maps, plats, profiles and specifications is allowable. The ordinance also refers to the plans, profiles and specifications attached to the ordinance, and adds, "and hereby made a part of the ordinance." This makes such plans, etc., part of the ordinance, and would be a sufficient compliance with the statute even prior to the amendment of 1887. *Hutt et al. v. City of Chicago*, 132 Ill. 352.

Neither is the third objection, as a proposition of law, well taken. One of the powers conferred upon the city council in cities, by section 62, article 5, chapter 24, of the Revised Statutes, is, "to lay out, establish, open, alter, widen, extend, grade, pave, or otherwise improve streets." Also, "to construct and

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keep in repair bridges, viaducts and tunnels, and to regulate the use thereof." We can discover no good reason for holding, that under these powers a viaduct like the one in question may not, in a proper case, be paid for by special assessment as a local improvement. The statute does not say what shall be considered a local improvement. The determination of that question is left to the city council or village board. Acting within the scope of the power conferred by section 62, *supra*, the city council in cities, and the president and board of trustees in villages, are the judges of the utility of an improvement upon streets, and whether such improvement shall be treated as a local improvement in raising funds to pay for it. Their decision on these questions is final. (*Fagan et al. v. City of Chicago*, 84 Ill. 227.) Of course they must act reasonably and without fraud, otherwise their action will be void.

The position that a street improvement which does not benefit abutting property can in no case be treated as a local improvement, and paid for by special assessment, is not tenable. It is held in *Guild, Jr. v. City of Chicago*, 82 Ill. 472, that under section 1, of article 9, chapter 24, of the Revised Statutes, a special assessment could be properly made on property benefited by an improvement, whether abutting and contiguous to the improvement or not. The question in every such case is, will the property assessed be specially benefited by the improvement? Nor do we think, under the facts of this case, the cost of the improvement could not be lawfully paid by special assessment, merely because the viaduct would extend across Cahokia creek and serve the purpose of a bridge over that stream. The evidence shows that it would be impossible to construct a way over the railroad tracks in question, with a proper approach from the west, without crossing the creek, and the fair conclusion from all the proof is, that the cost of a suitable viaduct at that place would not be increased by the fact that it would extend over the creek. Therefore, if their property is liable to assessment at all, appellants

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are in no way injured by the fact that the creek will be bridged. The assessment can be no greater than it would have been had there been no creek there.

It remains to be determined whether, under the facts appearing in the record, the assessment can be sustained.

Appellants objected, on the trial, to the introduction of the assessment roll in evidence, for the reason that it did not show what part of the assessment against each of them was assessed against each lot, block, tract or parcel of land separately, in the proportion in which they would be severally benefited by the improvement. This objection should have been sustained. Conceding, as contended in argument, but in respect of which we express no opinion, that an assessment might be made upon the basis of benefits accruing to the railroad companies named, in the use of the particular lots, blocks and right of way sought to be assessed, by reason of increased facility in running their trains across Broadway and the like, the assessment, as returned, shows that it was not attempted to be made upon that basis. The property assessed is parts of blocks, lots and right of way. Section 140, of article 9, chapter 24, of the Revised Statutes, requires the commissioners, in making their assessment roll, to give a description therein "of each lot, block, tract or parcel of land, and the amount assessed as special benefits thereto." The property so described can only be assessed on the principle of benefits conferred upon it—not on its owner generally; and it must appear from the proceedings that such was the principle upon which the assessment was made. (*Crawford et al. v. The People ex rel.* 82 Ill. 557; sec. 139, art. 9, *supra.*) Here, in the case of the Louisville and Nashville Railroad Company, the question is, will "parts of blocks 8 and 9 and the right of way across Broadway" be benefited \$13,500; and certainly there should be some description of the property from which it could be seen that it would or might be benefited to that amount. Where blocks 8 and 9 are situated with reference to the improvement, or

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even the railroad, does not appear. What parts of the blocks are assessed is not stated. What they are used for, or whether improved or unimproved, is not shown, nor does it appear how much of the \$13,500 was assessed to them and how much to right of way. Neither is there an attempt to describe the right of way across Broadway. The description is equally uncertain and indefinite in the case of each of the other appellants.

This uncertainty as to what particular property was assessed is made more prominent by the fact that the city relies wholly upon the assessment roll to sustain the assessment, insisting that by it a *prima facie* case is made, which objectors have failed to overcome. No attempt whatever was made upon the hearing to support the commissioners' report by proof that the property would be benefited to the amount assessed. In chief the city rested its case on the report alone. Its evidence in rebuttal merely went to the question of a necessity for the viaduct, and the general benefits which would result to the railroad companies running trains across the street. No witness pretended to say to what extent the particular property assessed would be benefited for the use to which it was or might be appropriated, if at all. No one can take this assessment roll and from it determine how much the commissioners thought each lot, block, tract or parcel of land assessed would be specially benefited, or right of way be specially benefited in respect to its use as such, by the building of the viaduct; and it is impossible to read the entire record without being forced to the conclusion that they fixed the amount which each railroad company should pay, not upon the basis that particular lots or right of way would be specially benefited, but upon the theory that the owners would be benefited generally to that amount.

We are also of the opinion, that, even if the commissioners' report could be given the effect of making a *prima facie* case for appellee, it was fairly overcome by the proof of appellants. A number of witnesses testified on their behalf that a viaduct

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built according to the plans and specifications attached to the ordinance would be an injury rather than a benefit to the companies using the tracks across Broadway, because one or more of its piers would so obstruct the view that more watchmen than are now required would be necessary to avoid collisions. No attempt whatever was made by the city to overcome or explain this evidence. Again, the proof clearly shows that neither the Mobile and Ohio Railroad Company nor the Illinois and St. Louis Railroad and Coal Company owns the right of way across Broadway. They each have but a contract right to run trains over the tracks of the East St. Louis and Carondelet railway. The right of the Mobile and Ohio Railroad Company, by the terms of its contract, is liable to be determined at any time by giving twelve months' notice in writing. The contract of the Illinois and St. Louis Railroad and Coal Company is limited to February 1, 1892, and thereafter may be terminated on ninety days' notice. It is clear that if this be, as we are inclined to hold that it is, a mere license to run over these tracks, neither of these companies had such ownership in the right of way across Broadway as could be subjected to special assessment.

Doubtless there exists a necessity for a viaduct at the place in question. It may be, as contended on behalf of the city, that the companies using the railroad tracks across the street should bear the expense of its erection; but it can not be seriously contended that they can be compelled to do so in this proceeding, in the absence of proof that their property assessed will be specially benefited to the amount levied against it.

We think the county court erred in confirming the assessment, and its judgment will be reversed.

Judgment reversed.

Syllabus.

THE PEOPLE *ex rel.* John B. Standerfer, Collector,

v.

WILLIAM HAMILL.

*Filed at Mt. Vernon June 16, 1888.**

1. CONSTITUTIONAL LAW—*title of an act—requirements of the constitution of 1848—act of 1869 concerning subscription by counties to stock of St. Louis and Southeastern Railroad Company—diverting subscription from another company.* Section 20 of the act of March 10, 1869, entitled "An act to incorporate the St. Louis and Southeastern Railroad Company," which authorized certain counties through which the road was located, to subscribe to the capital stock of the company all or any part of any sums theretofore voted by the legal voters to another railway company, is void, as being in violation of section 23, article 3, of the constitution of 1848, which provided that "no private or local law which may be passed * * * shall embrace more than one subject, and that shall be expressed in the title."

2. That was a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created is germane to the object expressed in the title, the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, would affect, adversely, the corporation from which the subscription voted was sought to be diverted, and was, therefore, clearly not germane to the title of the act.

3. MUNICIPAL BONDS—*issued without lawful authority, void.* It is the doctrine of this court that municipal bonds issued for stock in railroad corporations without authority of law, are void, no matter into whose hands they may come, and the collection of taxes levied to pay the interest on the same may be enjoined.

4. SAME—*donation in aid of railroads—voted prior to constitution of 1870.* Where a county donation of bonds in aid of a railway is properly authorized under laws existing prior to the adoption of the constitution of 1870, by a vote of the people, under such laws, the bonds of the county may be issued under such authority after that constitution took effect, and they will be binding on the county so issuing them.

5. MUNICIPAL INDEBTEDNESS—*constitutional limitation—upon what valuation or assessment to be based.* It is held in this case that it is the value of the taxable property of the county, to be ascertained by the

*This case has not appeared sooner in the Reports on account of an inadvertence in directing its publication.

Brief for the Appellant.

"last assessment for State and county taxes previous to the incurring of" an indebtedness, that is, the assessment made by the local assessor, upon which the five per cent is to be computed which limits the power of the county to contract a debt, and not the equalized valuation as fixed by the State Board of Equalization. But this decision is overruled in the later case of *Culbertson et al. v. The City of Fulton et al.* 127 Ill. 30, where it is held, that it is the assessment as finally fixed by the State Board of Equalization that must govern, in determining the basis of the limitation of the power to create municipal indebtedness.

APPEAL from the County Court of Hamilton county; the Hon. JOHN C. EDWARDS, Judge, presiding.

Mr. GEORGE HUNT, Attorney General, and Mr. LEONIDAS WALKER, State's Attorney, for the appellant:

The charter of the St. Louis and Southeastern railway provided that the county court of Hamilton county might subscribe to the capital stock of that company the \$200,000 previously voted by the county to the Shawneetown branch of the Illinois Central railway, without any further vote. 3 Private Laws of 1869, p. 245.

Counties, cities, etc., might, under the constitution of 1848, be empowered by general law, by their charters or the charters of railway companies, to subscribe stock or make donations. *City of Virden v. Allan*, 107 Ill. 505.

This subscription is not affected by the constitution of 1870, as it was made June 11, 1869, before that constitution took effect. *Decker v. Hughes*, 68 Ill. 33; *Railroad Co. v. Pinckney*, 74 id. 277.

Under the constitution of 1848, the legislature could authorize the county, without a vote of the people, to subscribe to railroads. *County of Richland v. People*, 3 Bradw. 216; *Williams v. Town of Roberts*, 88 Ill. 21.

As to the power of the legislature to bestow the power upon a town to subscribe and take stock in a railroad without a vote, see *Town of Keithsburg v. Frick*, 34 Ill. 405, and *Railroad Co. v. City of Aurora*, 99 id. 205.

Brief for the Appellee.

It is contended the \$74,000 in bonds voted to the Evansville and Southern Illinois railroad exceeded five per cent of the taxable property as equalized by the State Board of Equalization; but as only \$37,000 of the bonds were delivered to the company, we do not see how this defense can avail. Even if the whole \$74,000 in bonds had been delivered, the true test of the value of the property of the county would be the assessment of the assessor, and not the equalized value by the State board.

Mr. WILLIAM HAMILL, *pro se*:

All of these bonds have been issued since the present constitution went into effect. They are *prima facie* invalid, and the burden of proof rests on the party affirming their validity. *Town of Prairie v. Lloyd*, 97 Ill. 179.

The \$200,000 in bonds voted to the Shawneetown branch of the Illinois Central Railroad Company, November 3, 1868, being void for want of power in the charter of that company, or any other lawful authority, to vote on that subject, the 20th section of the act of 1869, incorporating the St. Louis and Southeastern Railway Company, could not confer the requisite power and authority, for a municipal subscription to a railroad company by vote of the people, without any law authorizing it, is void, and contrary to said separate section 2 of the present constitution, and the General Assembly could not, by subsequent act, legalize it. And the bonds being issued without authority of law, there can be no innocent purchaser of them, for they are absolutely void. *Barnes v. Town of Lacon*, 84 Ill. 461; *Lippincott v. Town of Pana*, 92 id. 24; *Pitman v. Village of Freeburg*, id. 111; *Gaddis v. Richland County*, id. 119; *Middleport v. Aetna Life Ins. Co.* 82 id. 562; *Marshall v. Silliman*, 61 id. 218.

The purchasers of such bonds are bound to take notice of the recitals in the bonds, the records of the county court in relation to the voting and issuing of the bonds, the acts of the

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General Assembly specified in the bonds, and the laws and constitution of the State in force at the time of voting upon and time of issuing the bonds. *Lippincott v. Town of Pana*, 92 Ill. 24; *Gaddis v. Richland County*, id. 119; *Barnes v. Town of Lacon*, 84 id. 461; *Middleport v. Aetna Life Ins. Co.* 82 id. 562; *Bank of Toledo v. Porter Township*, 110 U. S. 608.

The legislature has no power to authorize the county court of a county to create a corporate debt, without the consent of the people, expressed at the polls. *Barnes v. Town of Lacon*, 84 Ill. 461; *Gaddis v. Richland County*, 92 id. 119; *People v. Cass County*, 77 id. 438; *Railroad Co. v. City of Sparta*, id. 505.

Section 20 of said act incorporating the St. Louis and South-eastern Railway Company is in violation of article 3, section 23, of the constitution of 1848: "No private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." No such object is expressed in the title, and hence it follows, all provisions of the bill not so expressed are void. *Middleport v. Aetna Life Ins. Co.* 82 Ill. 562; *Village of Lockport v. Gaylord*, 61 id. 276.

Mr. JUSTICE SCOTT delivered the opinion of the Court:

This was an application to the county court of Hamilton county, by the county treasurer, *ex officio* collector of taxes, for judgment against the owners of lots and lands, for the taxes of 1886 and prior years. The objector, in this case, had paid all taxes against his lands and lots for the years specified, except what is designated as "railroad tax." That tax was levied by the proper authorities of the county to pay interest on \$237,000 of bonds issued by the county of Hamilton to certain railroad corporations. The court sustained the objections made to the validity of the tax so levied, and refused the People judgment for the same against the property of objector. The case is brought directly to this court on the appeal of the

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People, and the decision of the county court refusing judgment against the lands of objector, is assigned for error.

It seems that \$200,000 of the bonds in controversy were issued by the county of Hamilton to the St. Louis and Southeastern Railroad Company in payment for stock in that corporation, and that \$37,000 of the bonds were issued by the same authorities, and are a part of a donation alleged to have been voted by the people of the county to the Evansville and Southern Illinois Railroad Company. As the validity of these bonds depends upon the construction of different statutes, it will be necessary to consider them separately.

First—As respects the \$200,000 bonds issued to the St. Louis and Southeastern Railroad Company, it is not claimed they were ever authorized, by any vote of the people of the county, to be issued to that particular corporation, either in payment for stock or otherwise. It is claimed, however, that at an election held on the 3d day of November, 1868, the voters of the county elected to subscribe \$200,000 to the capital stock of the Shawneetown branch of the Illinois Central railroad, and authorized the issuing of bonds to that amount in payment for a like amount of stock in that company, and that by the 20th section of the act to incorporate the St. Louis and Southeastern Railroad Company, approved March, 1869, the county was authorized and empowered to subscribe to the capital stock of such railway company the \$200,000, or any part thereof, voted by a majority of the legal voters of the county, to the "Shawneetown branch of the Illinois Central railroad." There is no pretense there is any enabling act other than the act of March 10, 1869, under which the county of Hamilton could have subscribed for \$200,000 stock in the St. Louis and Southeastern Railroad Company, and issued the bonds in question for the payment; and as the point made, that that section of the charter of the corporation authorizing such subscription is unconstitutional, must be sustained, it is fatal to the validity of this whole series of bonds.

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It is seen, the act of March 10, 1869, to which reference is made as giving the requisite authority to the county to subscribe for the stock and issue the bonds, is "An act to incorporate the St. Louis and Southeastern Railroad Company." That is all it purports to be by its title. The constitution of 1848, under which this act was passed, contained a restriction that "no private or local law which may be passed by the General Assembly shall embrace more than one subject, and that shall be expressed in the title." This is a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created, is germane to the object expressed in the title, (*Belleville, etc., Railroad Co. v. Gregory*, 15 Ill. 20, *City of Virden v. Allan*, 107 id. 505,) the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, affects, adversely, the corporation from which the subscription voted is to be diverted, and is, therefore, clearly not germane to the title of the act, and section 20 must therefore be held to have been inhibited by the constitution of 1848, and is for that reason void and of no effect. *Lockport v. Gaylord*, 61 Ill. 276; *Middleport v. Aetna Life Ins. Co.* 82 id. 562.

It is well settled by the previous decisions of this court, that municipal bonds issued for stock in railroad corporations, without authority of law, are void, no matter into whose hands they may come. As this view of the law is conclusive of the whole case in regard to this series of bonds, it will not be necessary to remark upon any other objections discussed in the argument. Holding, as is done, these \$200,000 of bonds were issued without authority of law, it follows, the taxes levied to pay the interest on the same is also without authority of law, and the People should not have judgment for the same against the lands of the objector.

Second—The other bonds (\$37,000) stand upon a different footing. At the general election held on the 2d of November,

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1869, a proposition was submitted to the legal voters of Hamilton county, whether the sum of \$74,000 be donated to aid in the construction of the Evansville and Southern Illinois railroad. That proposition was adopted, and the county court found it was authorized to make a donation to such railroad company in bonds to run twenty years, and to bear interest at the rate of seven per cent per annum. The \$37,000 of bonds in controversy are one-half of the donation voted, the issuing of bonds for the other half of the donation having been, for some reason, waived. Although these bonds were not issued and delivered until since the adoption of the present constitution, the donation was authorized under existing laws, by a vote of the people of the municipality issuing them, prior to its adoption, and no reason is perceived why these particular bonds are not binding obligations upon the county.

It is said the donation of \$74,000 voted, exceeds five per cent of the taxable property of the county for that year, and is for that reason void, as being inhibited by that clause of the constitution which fixes a limit beyond which counties may not contract indebtedness. But it is the value of the taxable property to be ascertained by the "last assessment for State and county taxes previous to the incurring of such indebtedness," upon which the rate per cent is to be computed which is to limit the power of the county to contract indebtedness, and not the "equalized valuation" as fixed by the State Board of Equalization. It is not said such indebtedness shall not exceed five per cent of the taxable property as ascertained by the State Board of Equalization, but as ascertained by the "last assessment for State and county taxes,"—that is, the assessment made by the local assessors. It is conceded that the valuation of the taxable property for that year, for county purposes, was \$1,503,087, as fixed by the local assessor. Five per cent of that amount, of course, would exceed the sum of \$74,000, the amount voted to be donated.

Mr. Justice MAGRUDER, dissenting.

Other points made against the validity of these particular bonds are thought to require no discussion. They were voted for by the people, and issued in conformity with enabling acts, and no valid reason appears why the people that voted for the issuing of these bonds should not be required to pay the taxes assessed to pay the interest upon them.

The judgment of the county court will be reversed, and the cause remanded to that court with directions to enter a judgment against the lands of the objector for that proportion of the taxes levied to pay the interest upon the \$37,000 of bonds, which may be readily ascertained by computation, and refuse judgment for the residue of such taxes.

Judgment reversed.

MAGRUDER, J.: I do not concur in that portion of the foregoing opinion, which holds that the five per cent limit of indebtedness named in Sec. 12, Art. 9 of the constitution, is five per cent of the taxable value as ascertained by the assessment for State and county taxes as fixed by the local assessor. I think the equalized valuation as fixed by the State Board of Equalization is the valuation contemplated by the constitution.

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ACTIONS.

ACTION OF ACCOUNT.

1. *Oath of auditor—waiver.* The requirement that an auditor, in an action of account, shall be sworn before entering upon his duties, is not jurisdictional, but is one that may be waived by the parties; and the appearance of the parties before the auditor, and the examination of witnesses, without objection that he is not sworn, will constitute such waiver. *Pardridge et al. v. Ryan*, 247.

2. The fact that one appointed an auditor in an action of account is also a master in chancery of the same court in which the action at law is pending, will not relieve him of the necessity of being sworn, if there be no waiver of the oath, before entering upon the discharge of his duties. *Ibid.* 247.

3. *Improper evidence before auditor—effect upon the auditor's finding.* The admission of incompetent or improper evidence before an auditor, in an action of account, will not require the court to set aside the report, when there appears sufficient competent evidence to sustain the auditor's finding. *Ibid.* 247.

4. *Judgment quod computet—what is determined thereby.* In an action of account, an interlocutory judgment *quod computet* is always entered before the final judgment upon the findings of the auditors. This judgment merely determines the defendant's liability to account, but determines nothing as to what may be due

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after account taken. If the liability to account is denied, the issue may be tried before a jury. *Pardridge et al. v. Ryan*, 247.

5. In this case, which was in assumpsit, the court, on its own motion, ordered that the form of action be changed to account, and the record showed that the defendant made no objection to the proceeding, and stated that he was willing to account, and asked that plaintiff should also account, whereupon the court appointed an auditor, and ordered that each party account with the other: *Held*, that the order directing an accounting might be regarded as a judgment *quod computet*. *Ibid.* 247.

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PRESENTATION AND ALLOWANCE OF CLAIMS.

1. *Jurisdiction—after notice for presentation.* Where a claim is filed in the probate court against an estate after the publication of notice for the presentation of claims, but before the day set for that purpose, and long after the day so set for the adjustment of claims it is allowed, the record failing to show the presence of the administrator or objection on his part, it will, in the absence of allegation and proof to the contrary, be presumed that the cause was continued from term to term. In such case, the court will have jurisdiction both of the subject matter and of the persons, to render the judgment. *Ward v. Durham et al.* 195.

2. An administrator gives the court jurisdiction of his person by notice for the presentation of claims against the estate, and will be bound to take notice of the orders of the court continuing claims filed on or before the day named in his adjustment notice. *Ibid.* 195.

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3. *How far conclusive—and upon whom.* A judgment allowing a claim against an estate of a deceased person is not only conclusive on the administrator or executor, but also against the heir-at-law or devisee in respect to the personal estate, in the absence of fraud or collusion in its rendition; but it is not conclusive against the lands left by the decedent. *Ibid.* 195.

4. So, on an application by an administrator for an order to sell land to pay debts, it was held that under the statute giving the heirs a right to contest a claim against the estate, the adjudication of the court in allowing a claim is only *prima facie* binding upon

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the heirs, although they may have neglected to avail themselves of the right to contest its allowance in the county court in the first instance. *McGarvey v. Darnall et al.* 367.

FRAUD IN PRESENTING CLAIM.

5. *Failure to disclose facts.* There is no fraud in the presentation against an estate of a note of the decedent, without disclosing facts which would defeat the allowance of the same. *Ward v. Durham et al.* 195.

JUDGMENT IN ANOTHER STATE.

6. *Where administration is granted in different States* to different persons, in respect to the same estate, there is no privity between the several administrators. Therefore, a judgment against the administrator in one State is not competent testimony to show a right of action against either a domiciliary or an ancillary administrator in another State, so as to affect assets in such other State. *McGarvey v. Darnall et al.* 367.

7. So on application to sell lands for the payment of a claim allowed against an estate, such judgment of allowance, even if recovered in the State or jurisdiction where the lands are situate, is not conclusive on the heir, but is only *prima facie* a charge on real estate. But a judgment recovered in another State, allowing a claim against an estate, is not competent evidence to show even *prima facie* the validity of such claim, for the purpose of subjecting real estate of the intestate in this State to its payment. *Ibid.* 367.

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8. *While there is privity* between the administrator and the heir in respect to personal estate left by the intestate, yet in respect of the realty of which such intestate died seized there is no privity. *Ibid.* 367.

CITATION FOR SURRENDER OF PROPERTY.

9. *What property to be included—the statute construed.* Section 81, chapter 3, of the Revised Statutes of 1874, authorizing the citation of any person having in his possession any goods, chattels, moneys or effects "belonging to any deceased person," does not mean merely goods, chattels, moneys, etc., placed in the hands of the party charged by the deceased in his lifetime, but includes also goods, etc., which belong to the estate of the deceased, and which may come into the hands of the party charged since the death of the deceased. As a dead person can own nothing, the words, "belonging to any deceased person," can only mean, "belonging to the estate of any deceased person." *Blair v. Sennott*, 78.

10. *Action under the citation—amendment of affidavit.* An administrator has the right to file an amended affidavit in a proceeding

ADMINISTRATION OF ESTATES.**CITATION FOR SURRENDER OF PROPERTY. *Continued.***

by him in the probate court, under section 81, chapter 3, of the Revised Statutes, entitled "Administration," and after the filing of such amended affidavit, proceedings under the original affidavit will be considered as abandoned. *Blair v. Sennott*, 78.

11. *Whether proceeding is under amended affidavit.* After the filing of an amended affidavit by an administrator, to discover and reach property concealed or kept by one wrongfully, and to compel its delivery to the administrator, it will be presumed that the proceeding was conducted under the amended affidavit; but the whole record may be looked into, to see whether the subsequent steps and orders were taken under the amendment or under the original affidavit. *Ibid.* 78.

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IN THE MATTER OF A MECHANIC'S LIEN. See LIENS, 4, 5, 6.

AGENCY.**AUTHORITY TO SELL.**

1. *Whether authority to collect included.* As a general rule, an agent who has the possession of goods belonging to his principal, with authority to sell, has an implied authority to receive payment for the goods when sold by him. *Bailey et al. v. Pardridge et al.* 188.

2. Where a traveling agent or salesman, having authority to make sale of goods, but none to collect the price, takes orders from a purchaser for the shipment of goods to him by the principal, a payment to such agent for goods thus bought will not be binding on the principal. In such case, the agent, not having possession of the goods, will not be presumed to have authority to receive the price on a sale. *Ibid.* 188.

UNAUTHORIZED SALE BY AGENT.

3. *Ratification by principal.* In case the owner whose goods have been sold without authority, sues the purchaser for the amount of the contract price for which the goods were sold, the sale, although unauthorized, will be regarded as ratified. *Ibid.* 188.

4. If goods are sold without authority, and the owner receives the price, or pursues his remedy for it by action at law against the

AGENCY. UNAUTHORIZED SALE BY AGENT. *Continued.*

purchaser, or if any other act be done in behalf of another who afterwards claims the benefit of it, this is a ratification. *Bailey et al. v. Partridge et al.* 188.

MONEY IN HANDS OF AGENT.

5. *Held in trust for principal.* See TRUSTS AND TRUSTEES, 3, 4.

BREACH OF TRUST.

6. *Agent can not allege.* Same title, 3, 4.

MASTER AND SERVANT.

7. *Master estopped to deny authority of servant.* See MASTER AND SERVANT, 5.

ALIBI.

REASONABLE DOUBT. See CRIMINAL LAW, 20, 21, 22.

AMENDMENTS.

AMENDMENT OF REPEALED STATUTE.

1. *Is void.* A statute purporting to amend a section of a prior act after its repeal, is invalid and abortive. A law not in existence is not the subject of amendment. *Louisville and Nashville Railroad Co. et al. v. City of East St. Louis*, 656.

CHANGING THE FORM OF ACTION.

2. *By the court, on its own motion.* See PRACTICE, 1.

AMENDING AFFIDAVIT OF CLAIM.

3. *In respect to mechanic's lien.* See LIENS, 3.

AMENDMENTS AND JEOPAILS.

DEFECT IN PLEADING.

Cured after verdict. See PLEADING, 1.

APPEALS AND WRITS OF ERROR.

RIGHT OF APPEAL.

1. *As to judgment entered as of a preceding term.* Where a county judge takes a case under advisement, and at a subsequent term gives judgment and directs it to be entered as of the preceding term, the parties will have the same right of appeal or to sue out a writ of error as if the judgment was rendered at such subsequent term, and also the right to a bill of exceptions, on proper application. *Hosmer v. Hunt Drainage District*, 360.

IN PROCEEDING IN BASTARDY.

2. A judgment against the putative father in a proceeding in bastardy, under the statute, is necessarily less than \$1000. So, in the absence of a certificate of importance, no appeal will lie from

APPEALS AND WRITS OF ERROR.**IN PROCEEDING IN BASTARDY. *Continued.***

the judgment of the Appellate Court in such proceeding, to this court. *Scharf v. The People*, 240.

3. *Proceeding in bastardy—of its nature—whether included in the proviso to the 8th section of the Appellate Court act.* The special remedy provided by the Bastardy act is not "an action *ex contractu*," nor is the foundation of the right of recovery a "penalty," in the sense in which those terms are used in the eighth section of the Appellate Court act. *Ibid.* 240.

4. *Former decision.* The rule in that regard, as announced in *Rawlings v. The People*, 102 Ill. 475, is not adhered to. *Ibid.* 240.

AS TO AMOUNT INVOLVED.

5. *With reference to the question of jurisdiction.* The Supreme Court has no jurisdiction, by appeal or writ of error, to review the judgment of the Appellate Court affirming a decree dismissing a creditors' bill, where the judgment sought to be collected is less than \$1000; nor can the judgments of the several complainants be added together, so as to make out the sum of \$1000. *Aultman & Taylor Co. et al. v. Weir et al.* 137.

FINDING OF FACTS BY APPELLATE COURT.

6. *Presumption.* Where the Appellate Court affirms a judgment of the trial court in favor of the plaintiff, against two corporations sued jointly, it will be presumed that the Appellate Court has found all the facts alleged which are necessary to show a joint liability. *Consolidated Ice Machine Co. v. Keifer*, 481.

ERROR IN PROBATE COURT.

7. *Remedy by appeal.* See **PROBATE COURT**, 2.

EXCESSIVE SPECIAL ASSESSMENT.

8. *Remedy.* See **DRAINAGE LAW**, 18.

ARREST OF JUDGMENT.**DEFECT IN DECLARATION.**

1. *Cured after verdict.* See **PLEADING**, 1.

JURISDICTION OF THE PERSON.

2. *Waiver of objection.* See **JURISDICTION**, 7.

ASSESSMENTS.**ASSESSMENT FOR TAXATION.**

1. *Remedy when excessive.* See **TAXATION AND TAX TITLES**, 10.

DRAINAGE ASSESSMENTS.

2. *Benefits—and of a second assessment.* See **DRAINAGE LAW**, 5.

ASSIGNMENT.**CERTIFICATE OF PURCHASE.**

Taking with notice of irregularities. See SALES, 11, 12.

ASSIGNMENT FOR BENEFIT OF CREDITORS. See INSOLVENT DEBTORS.**ATTACHMENT.****NOTICE TO THE DEBTOR.**

1. *Inquiry to find residence.* The statute contemplates that if the residence of the defendant in attachment is not known, diligent inquiry shall be made to ascertain the same. If such inquiry is not made when it might be available, it will amount to a fraud on the debtor, especially when his property is attached and sold without notice to him. *Smith v. Huntoon et al.* 24.

AUDITOR.**IN ACTION OF ACCOUNT.**

Of the oath. See ACTIONS, 1, 2.

BASTARDY.**NATURE OF THE PROCEEDING.**

1. *Civil or criminal.* A proceeding in bastardy is a civil and not a criminal proceeding. In form it is criminal, but it is essentially of the nature of a civil action to compel a putative father to help support his offspring. *Scharf v. The People*, 240.

RIGHT OF APPEAL.

2. *The statute construed.* See APPEALS AND WRITS OF ERROR, 2, 3, 4.

BENEFITS.

IN CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN, 3 to 6.

BOND FOR COSTS. See COSTS, 1.**BREACH OF TRUST.****ESTOPPEL TO AGENT.**

To allege it, in order to escape liability. See TRUSTS AND TRUSTEES, 4.

BURDEN OF PROOF.

ON CONTEST OF WILL. See WILLS, 23, 24.

BURGLARY. See CRIMINAL LAW, 24, 30.

BURNT RECORDS ACT.

PARTIES TO PROCEEDING.

1. *All conflicting titles to be settled.* In a proceeding under the Burnt Records act, all persons claiming the title or any interest in the land are required to be made parties, and they are required, by answer or otherwise, to set forth their claims of title, and to establish the same by proof; and it is made the duty of the court to adjudicate in respect to all conflicting titles or claims. *Gage v. DuPuy*, 132.

OF THE PROPER DECREE.

2. On petition under the Burnt Records act, to establish title, etc., one of the defendants pleaded the limitation under the Bankrupt law, which was held a bar to the relief sought. The other defendant set up no title, and was in no way connected with his co-defendant's superior title. The court dismissed the bill only as to the successful defendant, but held, that as against the other defendant the petitioner was the owner of the fee: *Held*, no error in refusing to dismiss the suit as against the defendant making no defense. *Ibid.* 132.

3. Where a party in a chancery proceeding under the Burnt Records act, by his petition offered to pay the defendant the moneys expended in acquiring any tax titles, if he relied on any, and they should be declared invalid, and the tax title of one defendant was held good and the other defendant showed no title of any kind, it was *held*, that the court did not err in refusing to require the petitioner to pay for tax titles not shown or not set aside. *Ibid.* 132.

CERTIORARI.

AT THE COMMON LAW.

1. *In force in this State.* The common law remedy of certiorari is adopted and in force in this State, and any court exercising general common law jurisdiction has, unless expressly forbidden to do so by statute, an inherent authority to issue the writ. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

NOT A WRIT OF RIGHT.

2. The common law writ of certiorari is not a writ of right, but issues only upon proper application and proper cause shown. *Ibid.* 330.

WHEN THE WRIT MAY ISSUE.

3. The writ of certiorari may be awarded to all inferior tribunals and jurisdictions, where it appears that they have exceeded the limits of their jurisdictions, or in cases where they have proceeded illegally, and no appeal is allowed, and no other mode is provided for reviewing the proceedings. *Ibid.* 330.

CERTIORARI. *Continued.*

PURPOSE OF THE WRIT.

4. *Of the trial and judgment.* The purpose of the writ is to have the entire record of the inferior tribunal brought before the court in which the proceedings are sought to be reviewed, to determine whether the former had jurisdiction, or had exceeded its jurisdiction, or had failed to proceed according to the essential requirements of the law. The trial is solely by inspection of the record, and if that shows the want of jurisdiction, or illegality, the proper judgment is that the record be quashed. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

TO WHAT TRIBUNALS.

5. *The writ may issue.* The general rule seems to be, that this writ lies only to inferior tribunals and officers exercising judicial functions, and the act to be reviewed must be judicial in its nature, and not ministerial or legislative. But it is not essential that the proceedings shall be strictly and technically "judicial," in the sense in which that word is used when applied to courts of justice. It is sufficient if they are *quasi* judicial. *Ibid.* 330.

WHAT MATTERS CONSIDERED.

6. Upon *certiorari* at common law it can only be inquired, first, whether the inferior court has exceeded its jurisdiction; and second, whether it has proceeded according to law;—and this can only be determined from an inspection of the record. No fact can be considered unless it is a part of the record. *Blair v. Sennott*, 78.

WHETHER THE REMEDY.

7. In case a court refuses to make a record of its proceedings, the remedy is not by *certiorari*, but by *mandamus*. *Ibid.* 78.

CHALLENGE OF JURORS. See JURY, 1, 2, 3; EMINENT DOMAIN, 7.

CHANCERY.

PLEADING IN CHANCERY.

1. *Allegation of fraud—sufficiency.* The statement in a bill to enjoin the collection of a tax, that the action of the State Board of Equalization was fraudulent, is merely the statement of the conclusion or opinion of the pleader. It devolves on the party claiming fraud to state the facts relied on as constituting it. *Sterling Gas Co. v. Higby, Collector*, 557.

2. *Admission by demurrer.* Where the facts alleged in a bill do not necessarily amount to fraud, a demurrer to the bill does not admit fraud. Facts alleged for the purpose of showing fraud are to be taken most strongly against the pleader. *Ibid.* 557.

CHANCERY. *Continued.*

CROSS-BILL.

3. *Whether necessary.* While no affirmative relief can be granted on answer, yet the court may require the complainant to do equity as a condition to relief, without a cross-bill. *King v. Cooper*, 183.

PLEAS IN CHANCERY.

4. *Of the strictness required.* The same strictness and exactness are required in pleas in a suit in equity that are required in pleas in actions at law,—if not in matters of form, at least in matters of substance. *Cheney v. Patton et al.* 422.

5. *General requisites.* A plea in chancery should clearly and distinctly aver all the facts necessary to render it a complete equitable defense to the case made by the bill, so far as the plea extends. *Ibid.* 422.

6. Where the allegations of the plea, being taken as true, do not, so far as it purports to go, make out a full and complete defense, or when the necessary facts are to be gathered by inference alone, the plea will not be sustained. It must be specific and distinct, and must be perfect in itself, so that, if true, it will make an end of the case, or of that part of the case to which it applies. *Ibid.* 422.

7. *Sufficiency of plea of a former decree in another suit.* On bill by the mortgagee to foreclose, a plea of a decree in bar in a prior suit on the same notes and mortgage dismissing the bill brought by one claiming to be the assignee of the mortgage debt, is deficient in matter of substance if it fails to show that the prior suit was prosecuted at the mortgagee's instance, or with his knowledge and consent, and in his interest or for his benefit, or that there is, or ever has been, a privity in respect to the notes and mortgage between the several complainants in the two suits. *Ibid.* 422.

CREDITOR'S BILL.

8. *Priority to the diligent—who may complain.* The fraudulent grantee of property conveyed in fraud of creditors can not assign for error the giving of priority to the creditors on whose bills the conveyance is set aside. *Coale v. Moline Plow Co. et al.* 350.

9. *Preserving rights of third persons—as to lands not involved in the litigation.* Where the creditors, on bill to set aside a fraudulent conveyance, consent to a decree for the sale of a tract of land not in fact included in the fraudulent deed, and which therefore passed to the grantor's assignee, who was not made a party, the decree will be modified so as to make the sale subject to the title acquired by the assignee, as well as to the dower and homestead rights therein of the defendants. *Ibid.* 350.

10. *Parties—to bill to set aside judgment by confession.* See PARTIES, 1.

CHANCERY. Continued.**NUMEROUS DEFENSES.**

11. *Should be consistent.* A defendant in chancery may set up any number of defenses, but they must be consistent with each other. Though where inconsistent defenses are interposed, and no exception is taken on that account, and on the hearing one is found to be untrue and the other established, the decree will not be reversed on account of such untrue and inconsistent defense. *Scanlan et al. v. Scanlan*, 630.

SETTING ASIDE DECREE.

12. *For fraud.* Where the only allegation of fraud for the setting aside of a decree is the suppression of certain contracts relating to the subject matter of the suit, which could not have changed the result if they had been produced and the attention of the court called to them, the bill seeking to set aside the decree upon that ground can not be maintained. *Bates et al. v. Great Western Telegraph Co. et al.* 536.

IMPEACHING DECREE BY INFANTS.

13. *Upon what grounds.* A minor may maintain in this State a bill to impeach a decree against him, for fraud, or for error appearing upon the face of the record. *Coffin et al. v. Argo et al.* 276.

RELIEF AGAINST JUDGMENT AT LAW.

14. To entitle a defendant to relief against a judgment or decree on the ground of fraud, accident or mistake, it must be made evident that he had a defense on the merits, and that such defense has been lost to him without his own omission, negligence or default. The loss of the defense must be caused by the fraud of the prevailing party, or by mistake on the part of the other party, unmixed with any fault of himself or agent. *Ward v. Durham et al.* 195.

15. Mere irregularity, or the insisting upon rights which, upon a due investigation of those rights, may be found to be overstated or overestimated, is not the kind of fraud which will authorize a court of equity to set aside a judgment. *Ibid.* 195.

16. A court of equity will not set aside a judgment of a court of law for an alleged want of service of process, unless the judgment is shown to be unjust and inequitable. This rule applies also to judgments by confession under warrants of attorney. *Hier et al. v. Kaufman et al.* 215.

17. Where judgments by confession are based upon full and adequate consideration, and there is nothing to impeach their justice, a court of equity will not grant relief against them on the ground of want of authority to execute the power of attorney under which the confession was made. The remedy for such a defect is by motion in the court in which the judgment is entered. *Burch v. West et al.* 258.

CHANCERY. RELIEF AGAINST JUDGMENT AT LAW. *Continued.*

18. A court of equity has no jurisdiction to enjoin a judgment entered in a court of law, merely because the process of that court was not served on the defendant. Equity will only interfere where it is further shown that the judgment is inequitable and unjust. *Burch v. West et al.* 258.

SWORN ANSWER.

19. *As evidence.* It is only when the defendant states facts within his knowledge, that his sworn answer must be overcome by evidence equivalent to two witnesses; and new matter set forth in the answer, not responsive to the allegations of the bill, is not evidence for the defendant. *Atkinson et al. v. Foster*, 472.

ALLEGATIONS AND PROOFS.

20. *Must correspond.* In a court of chancery, the relief granted must be in conformity with the allegations of the bill, and it will never be granted in opposition to those allegations. *Eberstein v. Willets et al.* 101.

21. A complainant in chancery is not permitted to state his case one way in his bill and make another and different showing by the testimony. He must recover, if at all, on the grounds stated in his bill. The *allegata* and *probata* must correspond. *Purdy v. Hall et al.* 298.

22. So where a bill in chancery is filed for the purpose of setting aside the probate of a will, the complainant will be allowed to impeach the *prima facie* case made in favor of the validity of the will only upon the particular grounds that are alleged in his bill of complaint. *Ibid.* 298.

23. If a complainant in chancery can recover at all, it must be upon the case made by his bill. He will not be permitted to make one case by his bill and another by his proofs. *Coale v. Moline Plow Co. et al.* 350.

24. So where a creditor's bill seeks to set aside a conveyance of land by a husband to his wife on the ground the conveyance was without consideration, and fraudulent as against creditors of the former, the deed can not be held to be fraudulent as being unlawful preferences, in contravention of the Voluntary Assignment act. *Ibid.* 350.

DEED MADE UNDER DURESS.

25. *Bill to set it aside.* See DURESS, 2.

COMPOUNDING A FELONY.

26. *Deed made for that purpose—bill to set it aside.* See COMPOUNDING A FELONY, 1.

CHANGE OF VENUE.**REGULARITY OF PROCEEDINGS.**

1. *Objection waived after verdict.* An objection to the sufficiency of the clerk's certificate to the transcript of the proceedings on a change of venue is waived by the party going into the trial. All objections to the regularity of the proceedings in obtaining a change of venue, and the jurisdiction of the court to which the case is sent, are waived by the verdict. *Langford v. The People*, 444.

CHARACTER OF ACCUSED.

ON TRIAL OF CRIMINAL CHARGE. See **CRIMINAL LAW**, 23.

CHARGE UPON LAND.

UNDER A DEVISE. See **WILLS**, 8.

CHECK.

PAYMENT BY CHECK. See **PAYMENT**, 1.

CITATION.**BY ADMINISTRATOR.**

For property of the estate. See **ADMINISTRATION OF ESTATES**, 9, 10, 11.

CITIES AND VILLAGES.

RIGHTS AND POWERS AS TO STREETS. See **STREETS**, 1.

COMPOUNDING A FELONY.**AS THE CONSIDERATION FOR A DEED.**

1. *Bill to set aside a deed.* In order to set aside a conveyance of land on the ground it was executed to compound a felony, the bill must allege that the deed sought to be avoided was executed in consideration of an agreement not to prosecute. *Eberstein v. Willets et al.* 101.

COMPOUND INTEREST. See **USURY**, 1 to 5.**CONFESSION OF JUDGMENT.****OPENING JUDGMENT.**

1. *And letting in defense.* Courts of law exercise an equitable jurisdiction over judgments by confession, so that where there is a want of service, or an absence of authority to confess, the debtor will not be driven into a court of chancery, but may move to set aside the judgment in the court of law. A court of law may open the judgment and allow the debtor to make his defense, leaving the judgment to stand as security. *Hier et al. v. Kaufman et al.* 215.

CONFESSION OF JUDGMENT. *Continued.*

2. The assignee of an insolvent debtor takes the property assigned subject to all valid pre-existing liens; and where such property is subject to the lien of an execution issued upon a judgment entered by confession under a warrant of attorney, and such judgment is opened to let the defendant interpose a defense, the county court should wait until the defense is heard and decided, before determining upon the lien of such an execution. If the defense is successful, the lien falls; otherwise it must be enforced. *Hier et al. v. Kaufman et al.* 215.

IRREGULARITIES.

3. *Time to object.* If a defendant in a judgment entered by confession desires to take advantage of mere irregularities in the entry of the judgment, it must be by application to the court in which it was entered. *Atkinson et al. v. Foster*, 472.

PLAINTIFF HAVING NO INTEREST.

4. *Judgment not void—but voidable.* A judgment by confession in the name of a mere naked assignee having no real interest, is not void, but may be avoided by creditor's bill in the plaintiff's name. *Ibid.* 472.

CONFLICT OF LAWS.

ADMINISTRATION OF ESTATES.

1. *Administration in different States—judgment in one State as evidence in another.* Where administration is granted in different States to different persons, in respect to the same estate, there is no privity between the several administrators. Therefore, a judgment against the administrator in one State is not competent testimony to show a right of action against either a domiciliary or an ancillary administrator in another State, so as to affect assets in such other State. *McGarvey v. Darnall et al.* 367.

2. In a proceeding for the partition of land in this State, one of the defendants, by cross-bill, set up the allowance of a claim in his favor against the estate of the deceased ancestor in the State of Iowa, the residence of the decedent at his death, and asked to have such judgment paid out of the proceeds of the land in case of a sale, but made no proof of the justness of the claim, other than the production of the judgment of allowance in Iowa: *Held*, that the cross-bill was properly dismissed for want of proof of the claim, and that the judgment of the Iowa court was not evidence against the heirs of the intestate. *Ibid.* 367.

CONSENT.

ORDER ENTERED BY CONSENT.

Estoppel to assign error. See PRACTICE IN THE SUPREME COURT, 2.

CONSTITUTIONAL LAW.

CONSTRUCTION.

1. *Adopting provisions of prior constitution, and the construction thereof—presumption.* It must be presumed that when the present constitution was adopted it was with full knowledge of the interpretation that had been placed by this court upon the language incorporated therein, which was taken from the prior constitution. *Sterling Gas Co. v. Higby, Collector*, 557.

DRAINAGE LAW OF 1885.

2. *Its constitutionality.* See DRAINAGE LAW, 14.

MUNICIPAL INDEBTEDNESS.

3. *Constitutional limitation—upon what valuation or assessment to be based.* See MUNICIPAL INDEBTEDNESS, 1.

TAXATION OF CORPORATIONS.

4. *Classifying corporations—rule of uniformity—constitutional limitation.* See TAXATION AND TAX TITLES, 1 to 5.

TITLE OF AN ACT.

5. *Requirements of the constitution of 1848—act of 1869 concerning subscription by counties to stock of the St. Louis and Southeastern Railroad Company—diverting subscription from another company.* See STATUTES, 4, 5.
6. *Act of June 16, 1837, to regulate the manufacture, transportation, use and sale of explosives, etc.* Same title, 2, 3.
7. *Generally, of the constitutional requirement.* Same title, 1.

CONSTRUCTION.

OF THE CONSTITUTION.

1. *Adopting provisions of prior constitution, and the construction thereof—presumption.* See CONSTITUTIONAL LAW, 1.

CONTRACTS.

2. *Life insurance policy.* See INSURANCE, 1.
3. *Certificate of insurance.* Same title, 2, 3, 4.

STATUTES.

4. *Of their construction.* See STATUTES, 6, 7, 8.

WILLS.

5. *Construction of wills.* See WILLS, 1.

CONTESTED ELECTION. See ELECTIONS, 1.

CONTRACTS.

ORIGINAL OR COLLATERAL.

1. *Contract of guaranty.* A written agreement on the part of certain stockholders of a private corporation, with a bank, which held the notes of the corporation to the amount of \$20,000, secured
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CONTRACTS. ORIGINAL OR COLLATERAL. *Continued.*

by certain collaterals, guaranteed the bank that if it would give up such collaterals to the corporation they should be replaced, or if not, the bank should be paid by a day named, which guaranty was accepted and acted upon: *Held*, that the contract of the signers of the agreement was that of guarantors, and that such guaranty was collateral to the debt of the corporation, which still subsisted. *Home Nat. Bank of Chicago v. Estate of Waterman*, 481.

2. *The rule for determining.* Whether an engagement is original or collateral, is to be determined not alone from the particular words used, but from a consideration of both the terms of the contract and the circumstances of the transaction. *Ibid.* 461.

3. If the original indebtedness is extinguished, as, when the creditor surrenders his debt or demand against his original debtor and accepts the promise of a third person as a substitute therefor, such new promise is an original and direct undertaking, and binding on the maker in the first instance, and at all events. When there is no continuing liability of the original debtor, there is nothing to which a promise of another can be collateral. *Ibid.* 461.

CONTRACT FOR WORK TO BE DONE.

4. *Specifications, including a guaranty—as a part of the contract—extent of the guaranty.* A contract between contractors and a town, for laying a water pipe in a lake connecting with water-works, referred to the specifications, and plan thereto attached, as more fully describing what was to be done by the contractors, and expressly made the same a part of the contract. The specifications contained a provision that “all of the work to be guaranteed to remain in good condition for one year from date of acceptance:” *Held*, that such guaranty was as effectually made a part of the contract as if its very words had been incorporated in it. *City of Lake View v. MacRitchie et al.* 203.

5. Contractors for making an improvement according to the plans and specifications, may guaranty against all defects, whether they arise from insufficiency of the materials, unskillfulness of workmen, or from unfitness of the plans or designs, whether devised by the one or the other of the parties to the contract, or by some other person. *Ibid.* 203.

6. A party contracted with a village for the laying of pipes to supply water, which was to be done according to plans and specifications furnished by the village engineer, and all work and materials were to be to his satisfaction and subject to his approval. The specifications contained this clause: “All of the work to be guaranteed to remain in good condition for one year from date of acceptance:” *Held*, that the guaranty was not to be limited to work and materials furnished by the contractor, but embraced the plans

CONTRACTS. CONTRACT FOR WORK TO BE DONE. *Continued.*

and specifications, and covered the structure or work as an entirety, which was the joint product of the plan or design, the labor bestowed and the material furnished. It will be presumed that the consideration for such guaranty was included in the contract price. *City of Lake View v. MacRitchie et al.* 203.

INDEMNITY—USE OF STREETS.

7. *Use of street for railway purposes—agreement by company to indemnify the city against liability to individuals.* A railway company accepted the provisions of a city ordinance giving it permission to lay its tracks along a certain street on the condition it should pay the city for the erection of a viaduct over the street, which would be made necessary by the construction and operation of the road, and should indemnify the city from any and all legal damages, judgments, decrees, and costs and expenses of the same, which it might suffer, or which might be recovered or obtained against said city for or by reason of the granting of such privileges and authority, or resulting from the passage of the ordinance, or any matter or thing connected therewith. The city built the viaduct, and the owner of lots recovered \$10,000 damages against the city for injury to the same by destroying the means of ingress and egress to and from the lots: *Held*, that the railway company was liable to the city for the amount so recovered for the damage resulting to the property owner by reason of the construction of the viaduct. *Chicago, Burlington and Quincy Railroad Co. v. City of Chicago*, 323.

CONTRACT FOR SALE OF LAND.

8. *Rights and duties of parties are mutual and concurrent.* Where the notes given for the unpaid price of land sold are due, and no deed has been made, and both parties to the contract are in default, their rights and duties will be mutual and concurrent. The vendor will not be required to make a deed without payment of the notes, nor the purchaser to pay the notes without the execution or tender of a proper deed. *King v. Cooper*, 183.

9. *The vendor of land can not rescind the sale for the non-payment of an unpaid portion of the purchase money, and retain the money already paid and the improvements put upon the premises, without first tendering to the purchaser a deed properly executed, and making an offer to cancel and surrender his unpaid notes; but the court is not prepared to hold that the vendor shall also refund the money voluntarily paid on the purchase.* *Ibid.* 183.

STATUTE OF FRAUDS.

10. *Promise to pay the debt of another.* See STATUTE OF FRAUDS, 1.

CONTRACT TO PAY COMPOUND INTEREST.

11. *Not binding.* See USURY, 1 to 5.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE.

CONVEYANCES.

CONVEYANCE OF HOMESTEAD.

1. *The wife must join—even if the conveyance is to her.* The statute which declares that no conveyance of the homestead shall be valid unless the same is in writing, subscribed by the householder and his wife, if he has one, applies to deeds made by householders to their wives. Therefore, a conveyance of the homestead, not exceeding \$1000 in value, by a householder to his wife, she not joining therein and acknowledging the same, is void, and passes no title. *Kitterlin, use, etc. v. Milwaukee Mechanics' Mutual Ins. Co.* 647.

RIGHTS OF GRANTEE.

2. *Use of land to injury of grantor.* See RIGHT OF WAY, 1, 2, 3.

CONSIDERATION.

3. *Compounding a felony.* See COMPOUNDING A FELONY, 1.

DURESS.

4. *Deed made under duress.* See DURESS, 1, 2.

CORPORATIONS.

LEGALITY OF ORGANIZATION.

1. *Exercise of assumed powers—by what remedies to be questioned—former decisions.* In several cases in this court there are expressions from which it might be inferred that a *quo warranto* is the only mode of testing the legality of the formation of an existing *de facto* corporation; but that question did not arise and was not decided in them. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

2. In *Lees v. Drainage Commissioners*, 125 Ill. 47, it is held that the writ of certiorari does not lie to determine whether a corporation has a legal existence, and that the validity of its organization can be questioned only by *quo warranto*. In that case, the corporate existence itself of a *quasi* municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto* and *de jure*, extending the boundaries of the district. *Ibid.* 330.

3. No good reason is perceived why a municipal corporation which has exceeded its jurisdiction and has proceeded illegally, may not be proceeded against by *quo warranto*, by *scire facias*, or by the common law writ of certiorari, indifferently, as the one or the other may afford a proper and sufficient remedy. *Ibid.* 330.

POWERS OF OFFICERS.

4. *To give judgment notes.* Power in the president and secretary of a private corporation to give judgment notes to its creditors may

CORPORATIONS. POWERS OF OFFICERS. *Continued.*

be shown by facts and circumstances, such as the frequent giving of such notes, and the subsequent ratification by the board of directors. *Burch v. West et al.* 258.

SUBSCRIPTION FOR STOCK.

5. *After issue to others.* Stock in a private corporation, after its issue to outside parties, as owners thereof, is not the subject matter of subscription. A subscription must be for such stock as the company still owns and has not parted with. *Bates et al. v. Great Western Telegraph Co. et al.* 536.

STOCKHOLDERS.

6. *Contract diminishing liability—creditors.* As against creditors of a corporation, no contract made by the company can be allowed to stand which attempts to change a subscription into a purchase of paid up stock, or to diminish the amount to be paid by the stockholder. *Ibid.* 536.

7. The issue of certificates of stock to subscribers on payment of forty per cent of their subscriptions does not make them the holders of full paid stock in such sense as that they can not be called upon for the remaining sixty per cent, at the suit of creditors of the corporation. *Ibid.* 536.

CORPORATION—STOCKHOLDERS.

8. *Not identical.* See STATUTE OF FRAUDS, 1.

COSTS.

BOND FOR COSTS.

1. *Whether required.* After the entry of a decree in chancery favorably to the complainant, the defendants entered a motion to dismiss the suit for want of a bond for costs. It was not shown, by affidavit or otherwise, that at the time the suit was brought complainant was a non-resident: *Held*, no error to deny the motion. *Johnson et al. v. Huber*, 511.

COUNTY.

JURY FEES AGAINST COUNTY.

Condemnation in vacation. See EMINENT DOMAIN, 8.

COURTS.

REFUSAL TO MAKE RECORD.

1. *Remedy.* If a court refuses to make a proper record of its proceedings, the remedy is by *mandamus*—not by *certiorari*. *Blair v. Sennott*, 78.

CREDITOR'S BILL. See CHANCERY, 8, 9.

CRIMINAL LAW.

OF THE INDICTMENT.

1. *Several counts.* Where an indictment contains several counts, each count is to be treated as a separate charge, and must be complete within itself, except that for some allegations subsequent counts may refer to the first or former count. *Watson v. The People*, 374.

INTENT OF ACCUSED.

2. *How shown.* The intent of a party can ordinarily be shown only by inferences drawn from his acts and from his declarations. *Hronek v. The People*, 139.

ACCESSORY.

3. *Liability as principal.* Under a statute which provides that any person abetting or in any way assisting in certain denounced acts shall be deemed a principal, and upon conviction shall be subject to the same punishment as provided in the preceding sections relating to principals, a defendant, if guilty as an accessory before the fact, is to be indicted and punished as a principal. *Ibid.* 139.

ACTS DONE BY COMMAND OF SUPERIOR.

4. The command of a superior to an inferior, as, of a military officer to a subordinate, or of a parent to a child, will not justify a criminal act done in pursuance of it; nor will the command of a master to his servant, or of a principal to his agent. *Soby v. The People*, 66.

GAMBLING IN STOCKS, GRAIN, ETC.

5. *Act of 1887—scope and purpose of the act.* The act of 1887, entitled "An act to suppress bucket-shops, and gambling in stocks," etc., is directed against the keeping of any office or place, etc., wherein is conducted or permitted the pretended buying or selling of grain or other produce, on margins or otherwise, without any intention of receiving or delivering the property bought or sold. *Ibid.* 66.

6. The statute makes it an offense to keep a place, office, etc., wherein is conducted or permitted the pretended buying or selling of produce on margins. *Ibid.* 66.

7. For the purpose of preventing the evils resulting from such shops, and bucket-shopping, and of suppressing the vice of gambling in grain, it was intended by that act to close, suppress and prohibit the keeping of places where the practice of bucket-shopping or gambling in grain is permitted. *Ibid.* 66.

8. *Want of knowledge—as a defense.* It is not necessary to show the intention of the keeper of the office or place of business to bring the transaction within the prohibition of the statute. So the keeper of such office or place can not shield himself from criminal responsibility behind the fact that he made no inquiry of his cus-

CRIMINAL LAW. GAMBLING IN STOCKS, GRAIN, ETC. *Continued.*

tomers. The keeper must know that the transactions at his office are not gambling, or he must have reason to believe that the buying or selling is not within the intended prohibition of the statute. *Soby v. The People*, 66.

9. *Want of intention to consummate the bargain.* The offense is complete where the party buying such produce, or offering to buy the same, does not intend actually to receive the same if purchased, or to deliver the same if sold. *Ibid.* 66.

10. *Actual purchase to protect the buyer—effect on the character of the transaction.* Where a purchase of grain is made by an agent, and no delivery is intended, it being a speculation on the rise and fall of the market, the fact that the principal has made purchases in good faith of like amounts of grain to protect himself, will not change the nature of the transaction with the agent, and free it from the taint of gambling. *Ibid.* 66.

11. *Agency—no excuse for violating the statute.* If it is made unlawful to keep an office or place at which grain is illegally bought or sold under gambling contracts, it can make no difference that the person keeping such office is acting as the agent of another who makes purchases or sales on the Board of Trade for his customers. Such an agent is by the act made punishable, the same as his principal. *Ibid.* 66.

LARCENY.

12. *Sale of property alleged to have been stolen—whether authorizing a conviction.* On the trial of one upon a charge of larceny it was shown that a lot of cattle had been stolen in a particular county named, and that the defendant had sold the same cattle in another county. The court, on behalf of the prosecution, instructed the jury, substantially, that if they believed the alleged larceny had been committed, and that the defendant afterward removed the cattle from the county in which they had been stolen, to another county, and there sold them, then he was guilty of the crime of larceny. The defendant, testifying in his own behalf, stated that the cattle were delivered to him in the county in which they were charged to have been stolen, by another, with directions to make sale of them, which he did, in good faith and without knowledge that they had been stolen. The instruction was held to be erroneous, in that it authorized a verdict of guilty from the mere fact that the accused sold the property which had been stolen. All that was required by the instruction to authorize a verdict of guilty may have been proved, and yet the defendant be innocent of the crime for which he was being tried. *Graff v. The People*, 380.

MANUFACTURE, ETC., OF EXPLOSIVES.

13. *Of the intent—how shown—possession—declarations, etc.* On the trial of one for the manufacture, etc., of explosives with intent

CRIMINAL LAW. MANUFACTURE, ETC., OF EXPLOSIVES. *Continued.*

to take the life of another, the fact that the accused procured the explosive may be shown by proof that it was found in his possession, and the unlawful intent is manifested by the nature of the substance itself, his concealment of it, and his contemporaneous declarations of his intent. *Hronek v. The People*, 139.

14. Where a person is found in possession of dangerous explosives, and has avowed the intention of using them for a particular unlawful purpose, the presumption will arise that he procured the same for such unlawful use, especially when his business does not call for the use or possession of them. *Ibid.* 139.

15. *Constitutionality of the act.* See STATUTES, 1, 2, 3.

PERJURY.

16. *Elements to constitute the offense—materiality—evidence.* On indictment for perjury in giving false testimony on the trial of an action of ejectment, the prosecution, in order to convict, must prove that the defendant testified in that suit, willfully, corruptly and falsely, on a matter material to the issue involved in the action of ejectment. *Young v. The People*, 37.

17. If the assignment of perjury is on evidence on the trial of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proven, or at least so much of it as shows that the matter sworn to was material. *Ibid.* 37.

18. Where the alleged false testimony relates to the execution of a deed the record of which was offered on the trial of an ejectment suit, in order to show the materiality of the testimony it will be necessary for the People to show what the chain of title was, so as to establish the fact that the alleged deed was material; and such chain of title can not be shown by parol evidence, but must be shown by the title deeds, or enough of them to show the materiality of the deed to which the alleged false testimony related. *Ibid.* 37.

19. It is error to charge the jury, on the trial of one for perjury, that if they believe, from the evidence, beyond a reasonable doubt, the defendant willfully testified falsely in a material matter in the trial of a cause in court, as charged, etc., they should find him guilty. The statute requires the false testimony, to make out perjury, to be "in a matter material to the issue or point in question." Material matter may not be material to the *issue* or *point* in question. *Ibid.* 37.

ALIBI—AS A DEFENSE.

20. *Proof in respect thereto—reasonable doubt.* Where the evidence of the presence of one charged with crime at a different place than that of the crime is not necessarily inconsistent with his having been present at the place when the crime was committed,

CRIMINAL LAW. ALIBI—AS A DEFENSE. *Continued.*

as, where the accused might have been at both places, it will fail to establish the defense of *alibi*. *Aneals et al. v. The People*, 401.

21. A jury must believe, beyond a reasonable doubt, from a consideration of all the evidence, that a defendant is guilty, including the question of an *alibi*, if that is involved in the defense, before they are justified in so finding; and an instruction on a question of an *alibi*, that if, after considering all the facts and circumstances in proof, the jury had no reasonable doubt of the presence of the defendant at the place where the crime was committed, then the defense of *alibi* had not been made out, and was unavailing, is proper, and is not in conflict with the rule as to reasonable doubt. *Ibid.* 401.

REASONABLE DOUBT.

22. *Propriety of giving an instruction.* On a criminal prosecution the defendant asked, and the court refused, this instruction: "A reasonable doubt is one which arises from a careful and impartial consideration of all the evidence, and which, in the graver transactions of life, would cause a prudent and reasonable man to hesitate and pause." There was no other instruction given which embodied the full meaning of a reasonable doubt, as conveyed by the refused instruction: *Held*, that the court erred in refusing the instruction. *Wacaser v. The People*, 438.

PREVIOUS CHARACTER OF ACCUSED.

23. *As an element to be considered.* On the trial of a party for an assault with intent to murder, the previous character of the accused is competent evidence to be considered by the jury on the question of guilt or innocence, and it is proper to be considered in mitigation of punishment. But the force of such evidence must always depend upon the nature and character of the inculpatory evidence. *Aneals et al. v. The People*, 401.

POSSESSION OF STOLEN GOODS.

24. *As evidence of guilt—as to both burglary and larceny.* Where a larceny of goods is committed at the time of a burglary, the possession by a party, immediately after the crime, of some of the stolen goods, is evidence of guilt, and participation in the burglary as well as in respect of the larceny. *Langford v. The People*, 444.

ACCUSED TESTIFYING IN HIS OWN BEHALF.

25. *On cross-examination, asking as to a prior conviction of another offense.* On a trial of one under an indictment for robbery, the defendant testified in his own behalf, and on cross-examination he was asked if he had not been indicted and convicted of an assault to kill. On objection, the court ruled that the witness might answer the question or not, as he saw fit. Defendant's counsel, understanding that the court allowed the question, directed him to

CRIMINAL LAW. ACCUSED TESTIFYING IN HIS OWN BEHALF. Continued.

answer, and he testified that he had been once indicted for the offense named, and convicted simply of an assault and battery: *Held*, that there was no error. A misapprehension of counsel can not be regarded as an error on the part of the court. *Ogden v. The People*, 599.

TO JUSTIFY OR EXCUSE HOMICIDE.

26. *Degree of proof required—of an instruction on that subject.* An instruction in a criminal case which requires the accused to justify or excuse a homicide, or establish his defense to the satisfaction of the jury, is error, as calling for a degree of proof not required by the law. *Wacaser v. The People*, 438.

27. On the trial of one upon a charge of murder, the court, of its own motion, instructed the jury, that "if a man kills another, and the killing being proven or admitted, and then sets up self-defense as a defense to the indictment, the jury ought always to be *satisfied*, from the evidence, that the killing was done under an honest belief on the part of the defendant that it was necessary to save himself from death or great bodily harm," etc.: *Held*, that the instruction was erroneous, as calling for a higher degree of proof than was required of the defendant. *Ibid.* 438.

PROOF OF COLLATERAL MATTERS.

28. On the trial of three for an assault with intent to murder, the defendants called witnesses to prove their previous good character, who were asked by the State's attorney if they had ever heard of the assault of one of the defendants on a third party, and some of them stating that they saw that assault, the defendants offered to prove what did occur at the prior assault, which the court refused to allow: *Held*, that the proposed evidence was properly refused, as calling for collateral matters. *Aneals et al. v. The People*, 401.

HABITUAL CRIMINAL ACT.

29. *Second or third offense—prior conviction—allegations and proofs.* The act of June 23, 1883, prescribing the punishment in case of a second and third conviction for an offense of like character, expressly provides that the former conviction and judgment shall be set forth in apt words in the indictment, and this, like any other material allegation, must be proved as alleged. It is error to instruct the jury to fix the punishment of one convicted of burglary at twenty years, without regard to the fact whether there is any proof of a former conviction or not. *Watson v. The People*, 374.

30. The first and second counts of an indictment charged simply a burglary, while the third charged a burglary and a previous conviction for burglary. The court instructed the jury to fix the defendant's imprisonment in the penitentiary at twenty years, if they should find him guilty of the offense charged in the first count

CRIMINAL LAW. HABITUAL CRIMINAL ACT. Continued.

and that he had been previously convicted of burglary: *Held*, that as the first count charged no former conviction the court erred in giving the instruction. *Watson v. The People*, 374.

PLACE OF IMPRISONMENT.

31. *Act of 1887, to regulate the manufacture, etc., of explosives—construed.* Section 1 of the act of 1887, "to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," provides that any one found guilty of the acts therein denounced "shall be deemed guilty of a felony, and upon conviction thereof shall be punished for a term not less than five years nor more than twenty-five years:" *Held*, that the imprisonment intended is imprisonment in the penitentiary. *Hronek v. The People*, 139.

OF THE VERDICT.

32. *Certainty as to party found guilty.* On a separate trial of one of several defendants, the record showed the coming of the People by the State's attorney, and J. H., (the defendant,) impleaded, etc., and the selection of the jury, and trial. The jury found "the defendant" guilty, without specifying his name: *Held*, that the verdict was not uncertain as to the party found guilty. *Ibid*. 139.

33. *General verdict—several counts.* Where a burglary is committed by breaking into a railroad car, the prosecution may allege the ownership of the car in different corporations, by two or more separate counts; and a general verdict of guilty may be referred to either count, when only one felony is shown, and such verdict will authorize judgment. *Langford v. The People*, 444.

CROSS-BILL. See CHANCERY, 3.**DEATH OF SURETY.****EXTENSION OF TIME BY PRINCIPAL.**

Revocation of authority to do so. See SURETY, 3.

DEBTOR AND CREDITOR.**EXTENSION OF TIME OF PAYMENT.**

1. *Whether a release of other debtors.* See SURETY, 4.

PRINCIPAL AND AGENT.

2. *Whether the relation of debtor and creditor exists.* See TRUSTS AND TRUSTEES, 3.

DEMAND.**IN FORCIBLE ENTRY AND DETAINER.**

Whether necessary. See FORCIBLE ENTRY AND DETAINER, 3.

DEMURRER.

ADMISSION BY DEMURRER.

Insufficient allegation of fraud. See CHANCERY, 2.

DEVISE. See WILLS.

DOMINANT AND SERVIENT HERITAGE.

DRAINAGE OF HIGHWAYS. See HIGHWAYS, 2, 3, 4.

SURFACE WATERS. See SURFACE WATERS, 1.

DOWER.

ALLOTMENT OF DOWER.

1. *Rights of the widow.* Where there is no dwelling house on the premises in which dower is sought to be assigned, the commissioners assigning dower to the widow are not required by law to consult her wishes. They are only required to make a fair division, according to quality and quantity. *Moore v. Dick et al.* 43.

2. The statute does not require the commissioners to allot dower in such manner that the widow's allotment shall abut upon a highway. The failure to allot the dower on a highway is no ground for setting aside the commissioners' report, when it appears they have acted fairly, and have complied with the law and the order of the court. *Ibid.* 43.

RELEASE OF DOWER.

3. *As to equity of redemption.* The wife of the owner of the equity of redemption in land, who joins in a deed by her husband made on a sale of his interest, and also in the receipt for the price, will thereby be barred of her right of dower as against the purchaser. *Scanlan et al. v. Scanlan*, 630.

DRAINAGE.

AS TO DRAINAGE OF HIGHWAYS.

Power of highway commissioners—servient heritage protected. See HIGHWAYS, 2, 3, 4.

DRAINAGE LAW.

ORGANIZATION OF DISTRICT.

1. *Regularity—in what way questioned.* On bill to foreclose the lien of special assessments by the commissioners of a drainage district, the defendants can not call in question the regularity of the organization of the district. That can not be questioned collaterally. *Wabash Eastern Ry. Co. of Illinois v. Comrs. of East Lake Fork Special Drainage District*, 384.

2. *An unqualified admission, by answer and by stipulation.* of the due organization of a drainage district under a certain act named,

DRAINAGE LAW. ORGANIZATION OF DISTRICT. *Continued.*

is an admission that all the steps necessary to a legal organization of the district were taken in manner and form as prescribed by the act, including the presentation of the petition, giving the name and post-office address of each of the several land owners, so far as known, and the giving of the requisite actual or constructive notice to all persons having any legal interest in the proceedings. *Wabash Eastern Ry. Co. of Illinois v. Comrs. of East Lake Fork Special Drainage District*, 384.

JURISDICTION TO MAKE ASSESSMENTS.

3. *Derived by notice.* The jurisdiction of the commissioners to make an assessment is derived by the publication of the notice required by section 60 of the act, and is not dependent upon the voluntary appearance of the parties in interest. *Ibid.* 384.

ASSESSMENTS—TAXING POWER.

4. Special assessments are a species of taxation, peculiar in their nature, and subject to special rules, but the power to levy them is referable to the taxing power. *Ibid.* 384.

CHANGING PLAN OR SYSTEM OF DRAINAGE.

5. *Of a second assessment.* It is the duty of the commissioners of drainage districts first to adopt a plan or system of drainage which will protect all the lands in their district, and then to classify the lands to be benefited thereby. If, at any time before the completion of the work, the plans are found to be deficient to accomplish the purpose intended, the commissioners are empowered, by implication, to change the same, and may levy an additional assessment to make the necessary changes. *Reynolds et al. v. Milk Grove Special Drainage District*, 268.

ENLARGING DRAINAGE DISTRICT.

6. *Conditions to the exercise of the power.* Before the commissioners of a drainage district are authorized by law to make an order annexing other lands thereto, they must determine, from the evidence, whether the requisite number of adult owners have signed the petition for annexation, and whether the signers are the owners of the requisite proportions of the lands embraced within the district, and whether the lands sought to be annexed are involved in the same system of drainage, and require for outlets the drains of the district. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

ADDITIONAL ASSESSMENT.

7. *Petition and notice therefor—requisites—and where to be applied.* A petition for leave to raise an additional sum by assessment for the purpose of repairing or strengthening and improving a levee, and the notice thereof, need not state where the money shall be expended when raised. It may be used outside of the district,

DRAINAGE LAW. ADDITIONAL ASSESSMENT. *Continued.*

under the order and direction of the court. *Hosmer v. Hunt Drainage District*, 360.

NOTICE.

8. *Classification of lands,—notice by publication.* Section 60 of the Drainage act of 1885, which prescribes the mode of giving notice of the time and place for hearing objections to the action of the commissioners in classifying lands and levying assessments, only requires notice by publication, and it is immaterial whether copies of such notice are sent to parties interested or not. *Wabash Eastern Ry. Co. of Illinois v. Comrs. of East Lake Fork Special Drainage District*, 384.

9. *Admission of notice—as to classification of lands.* The admission that a notice of the time and place for hearing objections to the classification of the lands, and the levy of special assessments for benefits, was duly published, addressed "to whom it may concern," in a weekly newspaper, for two successive weeks, and that a copy thereof was duly mailed, postpaid, to each land owner, will be sufficient to show notice to all persons required by law to be notified. *Ibid.* 384.

10. *Change of plan—and second assessment—no notice.* No notice is necessary of the change of the plans in a drainage district, or of a levy of a second assessment occasioned thereby, when such change becomes necessary to protect all of the lands assessed. *Reynolds et al. v. Milk Grove Special Drainage District*, 268.

11. *Enlarging district,—of the notice required.* Section 42 of the Drainage act of 1885, vesting the commissioners of a drainage district with power to enlarge the boundaries of their district, fails to prescribe the mode of procedure, or the notice to be given to the owners of the lands sought to be annexed. The court holds, however, that the same notice required in the formation of an original district must be given of the proceeding for such enlargement, and that without such notice the order of annexation is void, and will be quashed on certiorari. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

12. *Defective notice—who may avail of it—in case of several land owners.* Although a land owner may waive a want of sufficient notice in a proceeding to annex additional territory to an already existing drainage district, by appearing at the time and place appointed for hearing objections, so far as he is concerned, yet he has the right to have the annexation valid and binding on all the land owners or on none, and therefore he may take advantage of the defective notice, unless all persons affected by the order appeared, and thereby conferred jurisdiction. In such case, the commissioners must acquire jurisdiction of all the land owners, and of all the lands

DRAINAGE LAW. NOTICE. Continued.

within the territory proposed to be annexed, before they may lawfully act. If the order of annexation is void as to some of the lands and owners, it is so *in toto*. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

13. *Modifying previous orders—without further notice.* Where the county court has once acquired jurisdiction, by proper notice, etc., of the matter of a special assessment of lands benefited, for the purpose of improving a levee, it may modify its orders from time to time, whenever necessary, until the matter is finally disposed of, without any further notice to the land owners. *Hosmer v. Hunt Drainage District*, 360.

LIEN FOR ASSESSMENTS.

14. *Nature and extent of lien—constitutionality of the act of 1885.* The Drainage law of 1885, giving a lien for assessments superior to the liens of existing incumbrances, is not unconstitutional, as impairing the obligation of contracts or divesting vested rights. Every one holds his property subject to the exercise of the taxing power, regardless of the nature of his interest,—whether a fee, an estate in expectancy, an estate for years, or a mere lien. *Wabash Eastern Ry. Co. of Illinois v. Comrs. of East Lake Fork Special Drainage District*, 384.

15. The lien of a special assessment in a drainage district created under section 72 of the Drainage act of 1885, is not upon any special interest in the land, but upon the land itself,—that is, upon the *res*. The lien so given is of the same nature, and subject to the same general rules, as that given in case of general taxes. *Ibid.* 384.

16. A lien of a special assessment, like the lien for taxes, attaches to the land itself, irrespective of the interests of the various owners, and is paramount to all other claims or liens against the property. *Ibid.* 384.

17. *Sale of railroad for lien of assessments.* On bill to foreclose the lien of a special assessment upon the right of way and track of a railroad company, the right of way and track may be ordered to be sold for the satisfaction of the assessment. *Ibid.* 384.

EXCESSIVE ASSESSMENT.

18. *Remedy—by appeal, only.* The statute having provided an adequate remedy, in case of an erroneous assessment, by appeal, that remedy must be held exclusive, and parties who have neglected to pursue it must be conclusively presumed to be satisfied with the assessment. *Ibid.* 384.

SUIT AGAINST DRAINAGE DISTRICT.

19. *Where to be brought.* A drainage or quasi municipal corporation having within its boundaries territory in two counties, must be deemed to be existing and located, for all purposes of jurisdiction,

DRAINAGE LAW. SUIT AGAINST DRAINAGE DISTRICT. Continued.

in every part of its territory; and the same is true of its corporate authorities, so that an action, even if local, may be brought against the corporation in either county. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

DURESS.**DEED MADE UNDER DURESS.**

1. *Not void, but voidable—ratification.* A deed obtained by duress is voidable, only,—not absolutely void; and it may not be avoided after ratification when the duress has been removed. *Eberstein v. Willets et al.* 101.

2. *Bill to set aside the deed—questions involved.* On bill to set aside a deed on the simple ground of duress, no question of the parties being *in pari delicto* can arise, but it is only material to inquire whether the act in question was the free and voluntary act of the party seeking to set it aside, or is it one prompted by fear, to which his judgment never assented. *Ibid.* 101.

3. *Laches—delay in filing the bill.* See **LIMITATIONS**, 1, 2.

EASEMENT.**BY PRESCRIPTION.**

1. *Right of way for an alley.* An easement in land may be acquired by an uninterrupted and adverse enjoyment for a period of twenty years. So where a party purchased a lot of ground upon the assurance that a strip sixteen feet wide should be left as an alley adjoining the lot, which strip was then staked off, and the purchaser erected buildings and fences on the line of the lot with reference to the alley, and used and improved such strip under claim of right for more than twenty years, it was held, that such purchaser acquired the right of way over the alley by prescription. *McKenzie v. Elliott*, 156.

2. While it is true that a private right of way can not be gained by the parol agreement of him who creates it, yet when, under such agreement, the way has been used for twenty years with the acquiescence of the owner, a prescriptive right to the same will thereby be gained. That the use began by permission will not affect the prescriptive right, if the other requisites exist. *Ibid.* 156.

3. It is not necessary that the party claiming an easement or right of way shall be the only one who can or may enjoy that or a similar right over the same land, but his right should not depend for its enjoyment upon a similar right in others. He must exercise it under some claim existing in his favor, independently of all others. *Ibid.* 156.

EJECTMENT.**OUTSTANDING TITLE.**

1. *By whom to be asserted—as to a mere trespasser.* A mere trespasser, who takes forcible possession of land without title, when sued in ejectment, will not be allowed to set up an outstanding title. *Anderson v. Gray*, 550.

2. Where a purchaser of land takes possession under his deed, there being no one in possession at the time, the deed will be sufficient to protect his possession against a mere trespasser without title, regardless of the title of the vendor. *Ibid.* 550.

ELECTION.**AS TO DOWER.**

1. *Election by widow as to assignment of dower.* See DOWER, 1, 2.

TO TAKE UNDER A WILL.

2. *Election by the widow.* See WILLS, 15, 16, 17.

ELECTIONS.**CONTESTED ELECTION.**

1. *Return term of summons—when the writ is void.* The statute giving a remedy for the contest of an election, declares: "Summons shall issue against the person whose office is contested, and he may be served with process or notified to appear in the same manner as is provided in cases in chancery." The ninth section of the act relating to practice in chancery provides: "Every summons in chancery shall be made returnable to the next term of the court after the date thereof, or the next succeeding term thereafter." So a summons issued out of the county court, in a proceeding to contest an election, made returnable to a term of the court beyond the second term after the teste of the writ is void. *Cavanaugh v. McConochie*, 516.

EMINENT DOMAIN.**COMMISSIONERS TO ASSESS.**

1. *All must act.* Under the act of 1852, relating to condemnation for right of way, the three commissioners appointed to fix the compensation and assess the damages for land taken by a railway company for right of way were all required to qualify, and must endeavor to agree. And unless all the commissioners were sworn, and acted together, their report will not authorize a judgment of condemnation. *Ohio and Mississippi Ry. Co. v. Barker et al.* 470.

2. Where the statute directs that three commissioners, when qualified, shall assess the damages to be paid for the taking of land for the public use, if they all qualify and meet, and attempt to agree, the decision or report of two of them will doubtless be bind-

EMINENT DOMAIN. COMMISSIONERS TO ASSESS. Continued.

ing ; but when only two qualify or act together their award or assessment will not be binding, unless the owner ratifies the act by accepting the damages. *Ohio and Mississippi Ry. Co. v. Barber et al.* 470.

MEASURE OF DAMAGES.

3. *As to land not taken—benefits.* In estimating the damages to land not taken, the jury should not consider any general benefits which the railroad may occasion in making a better market, or by affording conveniences for travel. They should not take into consideration such benefits as the land owner will enjoy in common with the owners of other lands through which the road runs, but only such as result to him over and above such common benefits. *Chicago, Peoria and St. Louis Ry. Co. v. Aldrich*, 9.

4. In a proceeding for the condemnation of a right of way for a railroad, and the assessment of damages to the part of the land not taken, the court instructed the jury, that in estimating the damages to the land not taken, they should consider the railroad as running only through the defendant's farm, and should not consider any general benefits which the road might occasion by making a better market, or by affording conveniences for travel, etc.: *Held*, that there was no error in the instruction. *Ibid.* 9.

5. In estimating the damage to that part of a farm not taken for a railway track and right of way, the jury may take into consideration such incidental injury as will result from the perpetual use of the track for moving trains, or from danger of killing stock or injury to pasturing stock, and the danger of the escape of fire, and such other damages as are reasonably probable to ensue from the construction and operation of the proposed railroad. *Ibid.* 9.

6. It is proper for the jury to consider whether the land owner's stock will be liable to be killed, and his farm injured, or his fences and buildings destroyed by fire. If there is a liability to such injury, its tendency is to depreciate the value of the farm and its use, as well as in the market; and such liability to injury may be regarded as proximate damages, as much as the danger and inconvenience of crossing the road from one part of the farm to another. *Ibid.* 9.

CHALLENGE OF JURORS.

7. *Right of challenge in vacation—and of the grounds of challenge—presumption.* The statute gives the parties to a proceeding to condemn land in vacation, the same right of challenge of jurors as in other civil cases in the circuit court. Under this statute, a ground of challenge in a civil case in a court of record is good in a condemnation proceeding. *Ibid.* 9.

EMINENT DOMAIN. Continued.**JURY FEES.**

8. *Whether taxable against the county.* In a proceeding to condemn land, and after judgment, the petitioner entered a motion to strike the jury fees from the fee book, for the reason that the county should pay such fees, which motion was overruled. There was nothing in the record to show that such fees were charged to the petitioner, or that any judgment for costs was rendered against it: *Held*, that no assignment of errors could be entertained on the record. *Chicago, Peoria and St. Louis Ry. Co. v. Aldrich*, 9.

TAXING WITNESS' FEES.

9. *Against whom.* Three cases for the condemnation of land for a railroad right of way were tried together. After judgment, the petitioner moved the court to tax the fees and costs of all the defendants' witnesses in excess of six, against the defendants. It did not appear that more witnesses were examined than were fairly and reasonably necessary. Moreover, under such circumstances there is no rule of law which made it imperative upon the court to tax the fees and costs of any of the witnesses to the defendants. *Ibid.* 9.

RIGHT OF WAY.

10. *By grant or deed—of damages to land not included in the grant.* See **RIGHT OF WAY**, 1, 2, 3.

ERROR.**ERROR AFTER VERDICT.**

1. *Remandment with directions.* See **PRACTICE IN THE SUPREME COURT**, 5.

ASSIGNMENT OF ERROR.

2. *Upon what ground.* Same title, 1, 2.

ESTOPPEL.**MATTERS OF ESTOPPEL.**

1. *Master and servant—estoppel of the master to deny agent's authority—in suit by the servant for injury.* See **MASTER AND SERVANT**, 5.

2. *Devisee—estoppel by recital in will.* See **WILLS**, 12.

3. *Renunciation of will by widow—estoppel.* Same title, 17.

4. *Order entered by consent—estoppel to assign error.* See **PRACTICE IN THE SUPREME COURT**, 2.

EVIDENCE.**DECLARATIONS OF GRANTOR.**

1. *To the prejudice of his grantee.* On bill by creditors to subject land conveyed by their debtor to his wife to the payment of their

EVIDENCE. DECLARATIONS OF GRANTOR. *Continued.*

judgments, the declarations of the debtor subsequent to his conveyance will not be competent evidence against the wife. *Coale v. Moline Plow Co. et al.* 350.

FACTS FROM THE SENSE OF HEARING.

2. *As distinguished from mere matter of opinion.* The statement of a fact by a witness which he ascertained through the sense of hearing, is not the statement of mere matter of opinion, but is the statement of a conclusion reached directly and primarily from an operation of the sense of hearing, and is admissible in evidence. *Ogden v. The People*, 599.

FOREIGN JUDGMENT.

3. *Against an estate.* A judgment against an administrator in another State is not competent evidence to show a right of action against the administrator of the same estate in this State so as to affect assets in this State. Such foreign judgment is not evidence against the heirs. *McGarrey v. Darnall et al.* 367.

4. In a proceeding for the partition of land in this State, one of the defendants, by cross-bill, set up the allowance of a claim in his favor against the estate of the deceased ancestor in the State of Iowa, the residence of the decedent at his death, and asked to have such judgment paid out of the proceeds of the land in case of a sale, but made no proof of the justness of the claim, other than the production of the judgment of allowance in Iowa: *Held*, that the cross-bill was properly dismissed for want of proof of the claim, and that the judgment of the Iowa court was not evidence against the heirs of the intestate. *Ibid.* 367.

LETTERS OF OPPOSITE PARTY.

5. Where the plaintiff in an action introduces in evidence the letters of the defendant, he will make their contents evidence against as well as for himself. *Bailey et al. v. Pardridge et al.* 188.

QUANTUM OF PROOF REQUIRED.

6. *On the trial of an action against a railway company, to recover for a personal injury while in the act of crossing the railway track in a street, the defendant asked the court to instruct the jury, that if the evidence was evenly balanced, or if it preponderated, as to a material point, in favor of the defendant, the finding should be not guilty, which the court modified by striking out the words "as to a material point," and then gave it: Held*, that under the facts the instruction was properly refused, as requiring too much proof on the part of the plaintiff. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

7. *To justify a homicide.* See CRIMINAL LAW, 26, 27.

8. *On the question of insanity.* See INSANITY, 1.

EVIDENCE. *Continued.***LIMITING APPLICATION OF EVIDENCE.**

9. *Admissibility.* Where evidence is competent as to one defendant but not as to another, there will be no error in its admission, but its use and application may be limited by instructions. If evidence is proper for any purpose, its admission is not error. *Consolidated Ice Machine Co. v. Keifer*, 481.

CONFIRMATION OF JUDICIAL SALE.

10. *Objections thereto—evidence—oral or by affidavit.* See SALES, 6.

IN ACTION FOR A NUISANCE.

11. *Evidence to show character and extent of injury.* See NUISANCE, 5.

SWORN ANSWER IN CHANCERY.

12. *Evidence to overcome such answer.* See CHANCERY, 19.

COPY OF A WILL.

13. *Not admissible on a contest of the will.* See WILLS, 25.

ON THE QUESTION OF NEGLIGENCE.

14. *Admissibility of evidence.* See NEGLIGENCE, 5, 6.

BURDEN OF PROOF.

15. *On contest of will.* See WILLS, 23, 24

EVIDENCE IN CRIMINAL CASES.

16. *Generally.* See CRIMINAL LAW.

EXCEPTIONS AND BILLS OF EXCEPTION.**GROUND OF CHALLENGE TO JUROR.**

Whether properly preserved. See JURY, 3.

EXECUTION.**AGAINST A RECEIVER.**

Not allowable. See RECEIVERS, 2.

EXECUTION SALE. See SALES, 7 to 14.

EXPLOSIVES.**OF THEIR MANUFACTURE, SALE, ETC.**

The statute on that subject—constitutionality, etc. See CRIMINAL LAW, 13, 14; STATUTES, 1, 2, 3.

EXTENSION OF TIME.**TO A PRINCIPAL.**

Release of surety. See SURETY, 1 to 4.

FEEES.**FEEES OF JURORS.**

1. *In condemnation proceeding—whether taxable against the county.*
See EMINENT DOMAIN, 8.

FEEES OF WITNESSES.

2. *In condemnation proceeding—against whom taxable.* Same title, 9.

FLAGMAN.

AT RAILROAD CROSSING. See NEGLIGENCE, 12 to 18.

FORCIBLE ENTRY AND DETAINER.**THE ACTION IS POSSESSORY.**

1. *Title not involved.* The title to land can not be determined in the statutory proceeding of forcible entry and detainer. *Stillman v. Palis*, 532.

2. So in such action it is not improper for the court, by instruction, to tell the jury that the title to the property is not involved, and that the material question for their determination is the right to the possession. *Ibid.* 532.

DEMAND.

3. *Before suit.* Where a party makes an illegal and forcible entry upon land in the possession of another, no notice or demand for possession by the latter, before bringing forcible entry and detainer, is necessary. *Ibid.* 532.

DESCRIPTION OF PREMISES.

4. The description of land in a complaint in an action of forcible entry and detainer, from which the land is susceptible of being easily and definitely located by a surveyor, is sufficiently definite and certain. *Ibid.* 532.

MOTION TO QUASH COMPLAINT.

5. *Too late after trial commenced.* A motion in a forcible entry and detainer suit to quash the complaint and dismiss the cause, for the reason that the description of the premises is insufficient and uncertain, and for want of a demand, comes too late after the jury is impaneled and sworn and the trial commenced. *Ibid.* 532.

FORECLOSURE.**FORECLOSURE OF MORTGAGE.**

1. *Junior mortgagee not a party.* See MORTGAGES AND DEEDS OF TRUST, 5.

LIEN OF SPECIAL ASSESSMENTS.

2. *Foreclosure.* See DRAINAGE LAW, 17.

FORFEITURE.

NON-PAYMENT OF TAXES.

Penalty. See TAXATION AND TAX TITLES, 11, 12.

FORMER ADJUDICATION.

AS TO WHAT MATTERS CONCLUSIVE.

1. *And as to one not a party to the suit.* Where a suit in chancery is prosecuted by one at the instance of another, who is the real party in interest, and for his benefit, then the adjudication will be binding and conclusive upon the latter, not only as to what was determined in the suit, but also in respect of all other matters properly involved, and which might have been presented and determined. *Cheney v. Patton et al.* 422.

PLEA OF FORMER ADJUDICATION.

2. *Sufficiency.* See CHANCERY, 7.

FORMER DECISIONS.

RIGHT OF APPEAL.

1. *Proceeding in bastardy—of its nature—whether included in the proviso to the 8th section of the Appellate Court act.* The special remedy provided by the Bastardy act is not "an action *ex contractu*," nor is the foundation of the right of recovery a "penalty," in the sense in which those terms are used in the eighth section of the Appellate Court act. The rule in that regard, as announced in *Rawlings v. The People*, 102 Ill. 475, is not adhered to. *Scharf v. The People*, 240.

ORGANIZATION OF CORPORATIONS.

2. *Legality—how questioned.* In several cases in this court there are expressions from which it might be inferred that a *quo warranto* is the only mode of testing the legality of the formation of an existing *de facto* corporation; but that question did not arise and was not decided in them. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

3. In *Lees v. Drainage Commissioners*, 125 Ill. 47, it is held that the writ of certiorari does not lie to determine whether a corporation has a legal existence, and that the validity of its organization can be questioned only by *quo warranto*. In that case, the corporate existence itself of a *quasi* municipal body was sought to be challenged by certiorari, while here such existence is fully admitted, and the only thing sought to be done is to call in question the validity of an order of a municipal body admitted to be a corporation both *de facto* and *de jure*, extending the boundaries of the district. *Ibid.* 330.

4. No good reason is perceived why a municipal corporation which has exceeded its jurisdiction and has proceeded illegally,

FORMER DECISIONS. ORGANIZATION OF CORPORATIONS. *Continued.*

may not be proceeded against by *quo warranto*, by *scire facias*, or by the common law writ of *certiorari*, indifferently, as the one or the other may afford a proper and sufficient remedy. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

TAXING CORPORATIONS.

5. *Classifying corporations—rule of uniformity—constitutional limitation.* The rulings in *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, and *Ottawa Gas Light and Coke Co. v. Downey*, 127 id. 201, are brought in review, and adhered to. *Sterling Gas Co. v. Higby, Collector*, 557.

INJURY AT RAILROAD CROSSING.

6. *Ordinary care.* In an action for personal injuries received by the plaintiff in attempting to cross a railroad at a point where there were numerous tracks, it was held, that the mere fact that by going several blocks out of his direct course the plaintiff might have crossed a railroad at a place where there were fewer tracks and the crossing was safer, which he fails to do, does not necessarily, and as a matter of law, charge him with a want of ordinary care. This case is distinguished from *City of Centralia v. Krouse*, 64 Ill. 19. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

MUNICIPAL INDEBTEDNESS.

7. *Constitutional limitation—upon what valuation or assessment to be based.* It is said in this case that it is the value of the taxable property of the county, to be ascertained by the "last assessment for State and county taxes previous to the incurring of" an indebtedness, that is, the assessment made by the local assessor, upon which the five per cent is to be computed which limits the power of the county to contract a debt, and not the equalized valuation as fixed by the State Board of Equalization. But this decision is overruled in the later case of *Culbertson et al. v. The City of Fulton et al.* 127 Ill. 30, where it is held, that it is the assessment as finally fixed by the State Board of Equalization that must govern, in determining the basis of the limitation of the power to create municipal indebtedness. *People ex rel. Standerfer v. Hamill*, 666.

FRAUD.

IN ATTACHMENT.

1. *Failure to make proper inquiry as to debtor's residence.* See ATTACHMENTS, 1.

CLAIM AGAINST AN ESTATE.

2. *Fraudulent.* See ADMINISTRATION OF ESTATES, 5.

EQUITABLE RELIEF AGAINST JUDGMENT.

3. *For fraud.* See CHANCERY, 14 to 18.

FRAUD. Continued.**DECREE AGAINST INFANTS.**

4. *Impeaching the decree for fraud.* See CHANCERY, 13.

SETTING ASIDE DECREE.

5. *For fraud.* Same title, 12.

FRAUDULENT CONVEYANCES.**DEED FROM HUSBAND TO WIFE.**

1. *Consideration.* Where a wife has, from time to time, received various small sums of money as her separate property, a portion of which went into her husband's hands, but without any stipulation as to repayment, and no interest was asked or received, and no accounting had in respect thereto until the larger part of it was barred by limitation, the moneys so coming to the husband's hands will not form a sufficient basis to sustain a conveyance by him to the wife, as against the rights of his creditors. *Coale v. Moline Plow Co. et al.* 350.

PURSING THE FUND.

2. *Into the hands of the grantee.* In case a grantee has received property knowing that the owner was intending thereby to place it beyond the reach of his creditors, a court of equity will follow it into the hands of such grantee, and subject it to payment of the grantor's debts. *Ibid.* 350.
3. So where a fraudulent grantee of real estate or other property sells or mortgages the same to a *bona fide* purchaser or mortgagee, such fraudulent grantee will be liable to the creditors of his grantor for the value of the property so received and sold, or for the money received by him under the mortgage; and in the latter case he will be held to account for the money received on the mortgage, without regard to the use made of it, unless its use inured to the benefit of the creditor. *Ibid.* 350.

GAMBLING.

- IN STOCKS, GRAIN, ETC. See CRIMINAL LAW, 5 to 11.

GENERAL LAW.

- APPLICABLE TO ONLY ONE CITY. See STATUTES, 9, 10.

GIFT.**IMPOSING RESTRICTIONS.**

- Right of the donor.* See TRUSTS AND TRUSTEES, 9.

GRANTOR AND GRANTEE.**DECLARATIONS BY THE FORMER.**

- To the prejudice of the latter.* See EVIDENCE, 1.

GUARANTY.

CONTRACT OF GUARANTY.

1. *What constitutes.* See CONTRACTS, 1, 2, 3.
2. *Guaranty construed.* Same title, 4, 5, 6.

HABITUAL CRIMINAL ACT.

SECOND OR THIRD OFFENSE.

Allegations and proofs. See CRIMINAL LAW, 29, 30.

HEIRS.

JUDGMENT AGAINST THE ESTATE.

Whether conclusive as to the heirs. See ADMINISTRATION OF ESTATES, 3, 4.

HIGHWAYS.

MODE OF IMPROVING THEM.

1. *Discretion of commissioners.* The manner of improving highways is left principally to the wise discretion of the commissioners of highways; and in the exercise of the duties imposed on them by law they can not be interfered with, unless they invade some private right of a citizen. *Young v. Comrs. of Highways*, 569.

DRAINAGE OF HIGHWAYS.

2. *Servient heritage protected.* Where commissioners of highways undertake to drain a public highway, they possess the same rights and are governed by the same rules as adjoining land owners who may undertake to drain their own lands, except where they may proceed under the eminent domain laws of the State. *Ibid.* 569.

3. Commissioners of highways, in draining a public road, have no right to divert the water from its natural course and turn it upon the land of another; and if they attempt to do so they may be enjoined by a court of equity, at the suit of the owner of the land on which the water is proposed to be turned. *Ibid.* 569.

4. The commissioners have no right or power to collect and carry a quantity of water along a highway which would naturally drain off in another direction, and discharge such accumulated water on the farm of an adjoining land owner; nor have they the right to divert water from its regular channel, or place where it would voluntarily flow off, and carry it along the line of the highway in ditches, for such a distance as they may desire, and then discharge it upon the farm of an individual. *Ibid.* 569.

LEGISLATIVE CONTROL.

5. *As to streets.* See STREETS, 1.

HOMESTEAD.**CHARACTER OF THE INTEREST OR ESTATE.**

1. *Prior to the act of 1873—nature of the right.* Prior to the going into effect of the act of 1873, the right of homestead was a mere exemption, and when the householder, in whom the exemption existed, conveyed without the formal waiver of the homestead, the effect was to transfer his title to the land, but so far as it affected the homestead right, the operation of the deed was suspended until the exemption was extinguished. *Kitterlin, use, etc. v. Milwaukee Mechanics' Mutual Ins. Co.* 647.

2. *Since the act of 1873—character of the interest in the householder.* But by the act of 1873 the householder became invested with an estate in the land, measured and defined by the value, and not by the extent or quantity, of his interest in the land or lot. And when the interest of the householder in the premises, whether in fee, for life or for years, does not exceed \$1000 in value, the homestead estate comprises and embraces his entire title and interest, leaving no separate interest in him to which liens can attach or which he can alien, distinct from the estate of homestead. *Ibid.* 647.

3. The estate of homestead thus created is based upon the title of the householder, and can have no separate existence independently from the title, which constitutes one of its essential elements and from which it is inseparable. *Ibid.* 647.

LIMITATION OF VALUE.

4. *As affecting the character of interest.* Where the value of the property to which the estate attaches is more than \$1000, the excess is unaffected by the estate; but when its value does not exceed that sum, the whole interest of the householder is comprised within the estate of homestead. *Ibid.* 647.

UPON THE DEATH OF A HOUSEHOLDER.

5. *Upon whom the estate devolves.* Upon the death of the householder in whom the estate of homestead is primarily vested, the estate, by operation of law, devolves upon the surviving husband or wife, for his or her life, and upon the children of the householder during the minority of the youngest; and the heir-at-law takes a reversionary interest, only, expectant upon the termination of the estate for life and for years created by the statute. *Ibid.* 647.

RELEASE OF HOMESTEAD.

6. *What will so operate.* Where the homestead premises are of less value than \$1000, a conveyance effectual to convey any interest in the land must of necessity be sufficient to operate as a relinquishment of the homestead. *Ibid.* 647.

CONVEYANCE OF THE HOMESTEAD.

7. *The wife must join—even if the conveyance is to her.* The statute which declares that no conveyance of the homestead shall be

HOMESTEAD. CONVEYANCE OF THE HOMESTEAD. Continued.

valid unless the same is in writing, subscribed by the householder and his wife, if he has one, applies to deeds made by householders to their wives. Therefore, a conveyance of the homestead, not exceeding \$1000 in value, by a householder to his wife, she not joining therein and acknowledging the same, is void, and passes no title. *Kitterlin, use, etc. v. Milwaukee Mechanics' Mutual Ins. Co.* 647.

IMPEACHING WITNESS. See **WITNESSES**, 5 to 12.

INADEQUACY OF PRICE.

SETTING ASIDE JUDICIAL SALE. See **SALES**, 5, 14.

INDEMNITY.**CONTRACT OF INDEMNITY.**

By railroad company with city—in respect to damages recovered against the city. See **CONTRACTS**, 7.

INFANTS.

BILL TO IMPEACH DECREE. See **CHANCERY**, 13.

INJUNCTIONS.**DIVERTING WATER FROM A HIGHWAY.**

1. *Upon the land of another.* Commissioners of highways, in draining a public road, have no right to divert the water from its natural course and turn it upon the land of another; and if they attempt to do so they may be enjoined by a court of equity, at the suit of the owner of the land on which the water is proposed to be turned. *Young v. Comrs. of Highways*, 569.

IRREGULARITIES IN ASSESSMENT.

2. *Under the Drainage law.* Where the officers of a drainage district are authorized by law to make a particular assessment, and there is no fraud, mere irregularities in the proceedings under which the assessment is made will not give a court of chancery jurisdiction to restrain its collection. *Reynolds et al. v. Milk Grove Special Drainage District*, 268.

AFTER THE ACT IS DONE.

3. *Writ improvidently granted.* Where the act sought to be enjoined is done before the complainant's bill is filed, and he knows it is already done, a preliminary injunction issued to prevent the act will be improvidently granted, and will be properly dismissed on the hearing. *Lake Shore and Michigan Southern Ry. Co. v. Taylor*, 603.

INJUNCTIONS. *Continued.*

FROM WHAT TIME OPERATIVE.

4. An injunction becomes operative, not merely from the time the writ is issued, but from the moment it is ordered by the judge. *Lake Shore and Michigan Southern Ry. Co. v. Taylor*, 603.

WRIT OF RESTITUTION.

5. *After dissolution of injunction.* After a person who claimed a strip of ground had inclosed the same by a fence, an adverse claimant procured an injunction restraining him from taking possession of the land or erecting the fence thereon, and while the defendant was restrained by the writ the complainant tore down such fence, and included the strip with his adjoining enclosure. It was held proper for the court, in dissolving the injunction, to restore the defendant to possession by a writ of restitution. The court should place the parties *in statu quo*. *Ibid.* 603.

INSANITY.

QUANTUM OF EVIDENCE.

1. *To overcome the presumption of sanity.* As the law presumes the sanity of all persons, the burden is cast upon the party alleging insanity at a particular time, to establish it by a preponderance of proof. No rule can be laid down as to the quantum of evidence necessary to establish insanity, except that it must be sufficient to overcome the legal presumption of sanity, and to overbalance the testimony tending to sustain such presumption. *Green v. Phoenix Mutual Life Ins. Co. et al.* 310.

INSOLVENT DEBTORS.

WHAT CONSTITUTES A GENERAL ASSIGNMENT.

1. *Whether the particular transaction is in fraud of the statute.* In considering a transaction between a debtor and a portion of his creditors, it was said, to hold that an insolvent debtor, who, at the demand of importunate creditors, gives judgment notes for less than one-third of what his property will sell for in cash and at forced sale, thereby makes a voluntary assignment of all his property for the benefit of his creditors, notwithstanding the fact he expects and intends to keep on with his business, and gives such notes upon the supposition it will the better enable him to proceed therewith, would be giving an interpretation to the statute not warranted by its language. So such a transaction is not to be regarded as a fraud upon the statute. *Burch v. West et al.* 258.

DEBTOR GIVING SECURITY.

2. *Prior to assignment.* The statute relating to voluntary assignments by insolvent debtors does not prohibit such a debtor from giving his creditor a judgment note or other security, unless it is

INSOLVENT DEBTORS. DEBTOR GIVING SECURITY. *Continued.*

made after he has made up his mind to assign, and with a view thereby to give a preference, in fraud of the act. If the debtor has no intention of ceasing business when he gives a judgment note or other security, and expects to continue his business, such security will be valid and binding. *Hier et al. v. Kaufman et al.* 215.

INSTRUCTIONS.

OF THEIR QUALITIES.

1. *An instruction presenting one theory—should be supplemented by the opposing theory.* Ordinarily it is not error to give an instruction embodying a correct proposition of law applicable to any tenable theory of the case, and the giving of such instruction will not usually require a reversal. If there is another theory to which this rule thus announced does not apply, it is usually the duty of the party relying upon such theory to ask the court to give such instruction as will properly present it. *Duncan v. The People*, 110.

2. *Technical inaccuracies—looking to the series.* Where, taking all the instructions as a series, it appears that the law has been fully and fairly given, the judgment will not be reversed for mere technical inaccuracies in some of the instructions given, not calculated to mislead, nor for the refusal of instructions asked which were not required, in view of those given. *Penn Mutual Life Ins. Co. v. Keach*, 583.

3. *Belief of the jury should be predicated upon the evidence.* An instruction in a criminal prosecution directed the jury, that if they believed certain specified facts they might convict. The instruction was considered objectionable in not limiting the belief to be entertained by the jury to that produced by the evidence given on the trial. *Graff v. The People*, 380.

4. *Instructions given by the court in lieu of those asked—requisites.* Where the trial court throws aside all the instructions asked by one or both parties, and prepares written instructions of its own, the latter must fairly instruct the jury on all the legal questions involved in the case, and it must appear that no injury has been done to the defeated party by the refusal of the instructions asked by him. *Wacaser v. The People*, 438.

5. *Faulty instruction—whether cured by others of a series.* Upon a prosecution under an indictment for larceny, an instruction was given on behalf of the People, directing the jury that if they should find certain facts they might convict; but it was considered that even if all that was required in the instruction to authorize a verdict of guilty, was proved, still the defendant may have been innocent of the crime charged, and, as the instruction assumed to state a complete case, it could not be truly said that it was but one of a

INSTRUCTIONS. OF THEIR QUALITIES. *Continued.*

series, and supplemented or qualified by others in the same series. *Graff v. The People*, 380.

6. *The practice of marking instructions for the one party or the other is pernicious, and should not be tolerated. They should go to the jury as the instructions of the court, without anything to indicate at whose instance given. Aneals et al. v. The People*, 401.

INSTRUCTIONS CONSTRUED.

7. *Whether excluding evidence offered in defense.* On the prosecution of one for the manufacturing, compounding, buying, selling, etc., of dynamite, with intent to destroy human life therewith, under an act that took effect on July 1, 1887, the defendant asked an instruction that to constitute the crime the acts charged should be shown to have been done after July 1, 1887. The court added this: "Therefore the jury must disregard any evidence as to the making, compounding or procuring dynamite, at C's house or elsewhere, prior to said date." The defendant, to account for dynamite found in his possession, testified that it was left in his house in 1886, by one K.: *Held*, that the instruction, as modified, was not calculated to take from the consideration of the jury the testimony explaining the defendant's possession of the dynamite. The instruction related solely to the elements necessary to constitute the crime charged, and had no reference to the defense. *Hronek v. The People*, 139.

8. *Whether liable to be understood as excluding evidence on one view of the case.* On the trial of an action against a street railway company for ejecting the plaintiff from its car, the company attempted to justify the expulsion on two grounds: the plaintiff's refusal to pay fare, and his use of language calculated to disturb other passengers. The court instructed, that even if the plaintiff did not pay his fare or some one pay it for him, and the conductor in charge of the car did not undertake to remove him in a peaceable manner, using no more force than was necessary, but pushed or threw him off the car while in motion, then, etc.: *Held*, that the instruction could not have been understood as excluding from the jury the consideration of the testimony tending to show misconduct of the plaintiff calculated to disturb the other passengers, especially when the jury were told, by other instructions, that the conductor would be justified in putting the plaintiff off the car for using vulgar and indecent language loud enough to disturb other passengers. *Chicago City Ry. Co. v. Pelletier*, 120.

9. *Instruction as to self-defense—declining further combat, etc.* On the trial of one for manslaughter, the court, for the prosecution, instructed the jury as follows: "In case of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon

INSTRUCTIONS. INSTRUCTIONS CONSTRUED. *Continued.*

the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury to the person killing : " *Held*, that the instruction was not calculated to mislead, as being likely to eliminate from the consideration of the jury the theory that the defendant, although the first aggressor, subsequently declined further quarrel, and that his subsequent acts were done in self-defense. *Duncan v. The People*, 110.

10. *Cured by a further instruction—so as to allow the theory of self-defense.* If an instruction for the People in such case is calculated to withdraw the consideration of the jury from his theory of self-defense, the giving of another instruction for the People which clearly recognizes the rule that the defendant, though the assailant in the first instance, might have retreated from that position by really and in good faith declining further combat, so as to be able to plead self-defense if the combat was afterward persisted in, will obviate all danger of misconception as to prior instructions. *Ibid.* 110.

11. *Whether assuming the fact—as, in manslaughter—that there was a homicide—and that the accused struck the mortal blow.* An instruction on the trial of a party for manslaughter, that, "the killing being proved, the burden of proving circumstances that justify or excuse the homicide will devolve upon the accused, unless the proof on the part of the prosecution sufficiently manifests that the accused was justified or excused in committing the homicide," is not open to the objection that it takes from the jury the question of the killing by the defendant, and excuses the prosecution from proving, in the first instance, that the homicide was unlawful, willful and felonious. It simply announces the statutory rule, that the killing of one human being by another is *prima facie* felonious, so as to throw the burden of justification or excuse on the person killing. *Ibid.* 110.

12. On the trial of one for manslaughter, the court instructed the jury, that if defendant brought on the conflict he could not claim the right of self-defense unless he really and in good faith abandoned the combat before the mortal blow was given : *Held*, that this instruction, standing alone, might probably to a certain degree be liable to the objection that it assumed as a fact that the mortal blow was given by the defendant ; but where the following instruction submitted that question of fact fully and formally to the jury, the defect, if any, was cured or rendered harmless. *Ibid.* 110.

INSURANCE.

LIFE POLICY.

1. *Rule of construction.* The words selected and used by a life insurance corporation in its policy or contract with the assured, are to be interpreted most strongly against the company. At all events, they are to be construed according to their common and literal meaning, in favor of the insured. *Union Mutual Accident Association v. Frohard*, 228.

ACCIDENT CERTIFICATE.

2. *Injury in an "occupation" other than that specified.* The by-laws of a mutual benefit accident association provided for the payment to the beneficiaries of certain sums on the death of members, ranging from \$5000 to \$500, according to the occupation of the member. A member took a certificate as a merchant, which called for \$5000 on his death. He was killed from an accidental shot while hunting for recreation. The sum paid on the death of a hunter was only \$500. It was provided in the by-laws, that any member receiving an injury "while engaged, temporarily or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he or his beneficiary shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury:" *Held*, that the word "occupation," as found in the by-laws, had reference to the vocation, profession, trade or calling in which the assured was engaged for hire or profit, and did not preclude him from the performance of acts and duties which were simply incidents connected with the daily life of men in any and all pursuits, and that the beneficiary was entitled to \$5000. *Ibid.* 228.

3. *Accident while engaged in "any act or occupation" not within the terms of the certificate.* In the same certificate it was stipulated "that in the event of the member being either fatally injured or otherwise disabled while engaged, temporarily or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association, * * * then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full:" *Held*, that the words "in any act," in the clause above, did not give the certificate any different meaning than it would have without them; and the fact that the member lost his life by an accident while hunting for recreation, did not reduce the sum agreed to be paid from that therein provided. *Ibid.* 228.

4. *Beneficiary—amount to be paid—cost of collecting assessments.* The by-laws of a mutual accident association provided, that on the

INSURANCE. ACCIDENT CERTIFICATE. Continued.

death of a member leaving a liability on it, the secretary should make an assessment of two dollars upon each of its members belonging at the time of the death, if there should not be enough money in the treasury to discharge such liability, and that such sum, less ten per cent for expenses, should be paid to the beneficiary in full : *Held*, that the amount due a beneficiary is, primarily, payable out of "moneys in the treasury," and if the sum in the treasury is not sufficient to pay the full amount of the claim, then an assessment of two dollars upon each member is to be made and collected, and if this, when collected, is sufficient to pay both the expenses of collection and the amount of the claim, then the beneficiary is to be paid in full, otherwise he is entitled to what is left after deducting the ten per cent. *Union Mutual Accident Association v. Frohard*, 228.

5. *Relief to beneficiary—character and extent.* Where it appeared that the officers of a mutual insurance company might, by the levy of two dollars upon each of its members, as it was their duty to do, have paid a certificate given to a member, but that they wrongfully refused to make such assessment until it was doubtful whether enough could be realized thereby, a court of equity, in its decree in favor of the beneficiary, directed the corporation and its officers to levy and collect an assessment of two dollars per member, and pay the same to such beneficiary, and decreed that such company and its officers should pay any deficiency there might be in the collection of the assessments. *Ibid.* 228.

INTEREST.

CONTRACT FOR COMPOUNDING. See **USURY**, 1 to 5.

JUDGMENTS.**ALLOWANCE OF CLAIM AGAINST AN ESTATE.**

1. *How far conclusive—and upon whom.* See **ADMINISTRATION OF ESTATES**, 3, 4.

FOREIGN JUDGMENT.

2. *Against foreign administrator—whether conclusive here.* Same title, 6, 7.

JUDGMENT AGAINST A RECEIVER.

3. *Only in his fiduciary character.* See **RECEIVERS**, 2.

JUDGMENT BY CONFESSION.

4. *Conditions, etc.* See **CONFESSION OF JUDGMENT**, 1 to 4.

JUDGMENT AND EXECUTION.

VARIANCE. See **SALES**, 8, 9.

JUDICIAL SALES. See **SALES**, 1 to 6.

JURISDICTION.

PRESUMPTION.

1. *The jurisdiction of inferior courts of limited jurisdiction must affirmatively appear in every case, for the reason that nothing will be presumed in its favor.* *Anderson v. Gray*, 550.

2. *Of county courts—presumption.* County courts in this State, in the exercise of the common law jurisdiction conferred on them by statute, are entitled to the same presumptions in favor of their jurisdiction as circuit courts. They are courts of record, and have the same power to pass upon their own jurisdiction, and to exercise it, without setting forth in their proceedings the facts upon which they determine that jurisdiction. *Ibid.* 550.

3. *Jurisdiction of the person—in county court—presumption.* The record of a judgment in the county court failed to show, affirmatively, service of process on the defendant, or his appearance: *Held*, that the judgment could not be considered void for want of jurisdiction of the person of the defendant, every reasonable presumption being in favor of the judgment. *Ibid.* 550.

COUNTY COURT.

4. *Of claims against estates, etc.* See **ADMINISTRATION OF ESTATES**, 1, 2.

SUING ONE OUT OF HIS COUNTY.

5. *Appearance—waiver—matter of jurisdiction to be pleaded.* Section 2 of the Practice act, which makes it unlawful for any plaintiff in a transitory action to sue any defendant out of the county where the latter resides or may be found, gives the defendant a privilege, merely, of being sued in the county where he resides or may be found, to avail of which he must do so in apt time, by plea to the jurisdiction, or he will be deemed to have waived it. *Comrs. of Mason and Tazewell Special Drainage District v. Griffin et al.* 330.

6. *Drainage district—residence—for the purposes of suit.* A drainage or quasi municipal corporation having within its boundaries territory in two counties, must be deemed to be existing and located, for all purposes of jurisdiction, in every part of its territory; and the same is true of its corporate authorities, so that an action, even if local, may be brought against the corporation in either county. *Ibid.* 330.

JURISDICTION OF THE PERSON.

7. *On certiorari—appearance—waiver.* If there be no sufficient service of process on a petition for a common law writ of certiorari, the appearance of the defendant without making objection is a waiver of all defects of jurisdiction of his person, and the objection comes too late on motion in arrest of judgment. *Ibid.* 330.

JURISDICTION. Continued.**BILL TO CONTEST WILL.**

8. *Jurisdiction—limitation of the right.* See WILLS, 18, 19, 20.

SPECIAL ASSESSMENTS.

9. *Under Drainage law—jurisdiction.* See DRAINAGE LAW, 3.

ON CHANGE OF VENUE.

10. *Waiver of objection to jurisdiction.* See CHANGE OF VENUE, 1.

JURY.**CHALLENGE FOR CAUSE.**

1. *Service within a year.* It is a sufficient cause of challenge that a juror called, if not a member of the regular panel, has served as a juror in the trial of any cause in any court of record in the county within one year previous to being called. *Chicago, Peoria and St. Louis Ry. Co. v. Aldrich*, 9.

2. *Presumption in favor of ruling on challenge.* Where the court sustains a challenge to a juror on the ground of his service on a jury in a court of record within a year previous to his being called, it will, in favor of the ruling, be presumed that he was not a member of the regular panel, but a juror to whom the cause of challenge would apply. *Ibid.* 9.

3. In a case where the bill of exceptions does not purport to contain all the evidence heard as to the qualification of jurors, and a general challenge is allowed, not specifically limited to the particular ground disclosed by the bill of exceptions, it will be presumed, if the particular ground is not shown, the challenge was sustained on other grounds. *Ibid.* 9.

JURY FEES.

4. *Whether taxable against a county—in condemnation proceeding.* See EMINENT DOMAIN, 8.

LACHES. See LIMITATIONS, 1, 2.

LARCENY. See CRIMINAL LAW, 12.

LEGACY.

WHETHER A CHARGE UPON LAND. See WILLS, 8.

LEGISLATIVE CONTROL.

OVER STREETS, HIGHWAYS AND PARKS. See STREETS, 1; PARKS, 2, 3.

LIENS.**MECHANIC'S LIEN.**

1. *Time of performance—as an element in creating the lien—as to express and implied contracts.* No lien is created by the statute

LIENS. MECHANIC'S LIEN. Continued.

under an express contract, if the time stipulated for the completion of the work or furnishing materials is beyond three years from the commencement thereof, or the time of payment is beyond one year from the time stipulated for the completion thereof. If the contract is implied, the work must be done or the materials furnished within one year from the commencement of the work or the delivery of the materials. No lien can be enforced unless the work, etc., is to be completed as required by the statute. *McDonald et al. v. Rosengarten et al.* 126.

2. *Statement of claim—time of filing same—requisites, etc.—as against other creditors or incumbrancers.* In order to enforce the lien as against any other creditor or incumbrancer, the party claiming the lien must file in the circuit clerk's office, within four months after the last payment shall become due, a just and true statement, account or demand due him, after allowing all credits, setting forth the times when such materials were furnished or labor performed, etc., verified by affidavit. *Ibid.* 126.

3. *Amendment of statement of claim.* Any amendment to the statement of claim would have to be attached to the original, and filed within the time provided in section 28 for the filing of the original. The language of that section is imperative. *Ibid.* 126.

4. *Affidavit of claim—sufficiency.* To a claim filed for a mechanic's lien was attached this affidavit: "F. A. W., being duly sworn, says he is the authorized agent for Hall Steam and Power Pump Company; that said company has performed the labor and furnished the materials set forth in the above statement of claim for a lien, and there is now due said company from John E. Burton, for said labor and materials, after allowing all credits and set-offs, the sum of \$175, which affiant charges and alleges is a lien upon the said above described premises:" *Held*, that the affidavit was no verification of the statement of the claim. *Ibid.* 126.

5. The affidavit may all be true, and yet the claimant be not entitled to any lien, as it fails to give any time. It should have been that the statement of the claim was true, it being required to state the time when the material was furnished, etc. The affidavit being defective, the claimant was not entitled to the lien sought. *Ibid.* 126.

6. The purpose of requiring the claim to set forth "the times when such materials were furnished or labor performed," is to enable those interested to know, from the claim itself, that it is such that can be enforced, and the verification by affidavit is required as a guaranty of the truth of the claim. *Ibid.* 126.

7. *Abstract of claim by clerk—and entry thereof—office of such entry.* The provisions of section 53 of the chapter of the Revised

LIENS. MECHANIC'S LIEN. Continued.

Statutes relating to liens, requiring the clerk to make an abstract of the claim in a book kept for that purpose, and properly indexed, containing the name of the person filing the lien, the amount of the lien, the date of filing, the name of the person against whom the lien is filed, and a description of the property charged with the lien, was not intended to take the place entirely of the claim itself, and constitute the only notice required. The only purpose of section 53 is to furnish a convenient and ample reference to the claim. *McDonald et al. v. Rosengarten et al.* 126.

SPECIAL DRAINAGE ASSESSMENT.

8. *Nature of lien—its priority—foreclosure thereof.* See DRAINAGE LAW, 14 to 17.

LIFE ESTATE.**POWER OF LIFE TENANT.**

To use and control the estate. See WILLS, 2, 3, 4.

LIMITATIONS.**LAPSE OF TIME ASIDE FROM THE STATUTE.**

1. *Deed given under duress—delay in seeking to avoid it.* Where a party seeks to avoid his deed in a court of equity on the ground of duress, he is required to move promptly, and must not sleep on his rights. In case of a delay on the part of the party pleading duress, clear and conclusive evidence will be required to explain the failure to proceed promptly. A delay of over three years is such *laches* as, unexplained, will bar relief in equity. *Eberstein v. Willets et al.* 101.

2. If one guilty of larceny, executes a deed for land, in the expectation it will have the effect to prevent a criminal prosecution, though no promise is given, and the party, though under arrest, is allowed to see and freely consult with his wife and his attorney, and he gives possession under his deed, after release, and takes no steps to avoid it, until after the statute has barred any prosecution against him, and no undue means are used to procure the deed, it will not be set aside. *Ibid.* 101.

BILL TO CONTEST WILL.

3. *Limitation.* See WILLS, 18, 19, 20.

LIMITING NUMBER OF WITNESSES. See PRACTICE, 13 to 16.

LOCAL IMPROVEMENTS. See SPECIAL ASSESSMENTS AND SPECIAL TAXATION.

LOCAL LEGISLATION. See STATUTES, 4, 5, 9, 10.

MANDAMUS.**AS A REMEDY.**

To compel a court to make a proper record. See REMEDIES, 1.

MARRIED WOMEN.

WHETHER THEY MAY SUE ALONE. See PARTIES, 3.

MASTER AND SERVANT.**NEGLIGENCE OF ANOTHER SERVANT.**

1. *Liability of the common master—fellow-servants.* Where one servant is injured by the negligence of his fellow-servant, their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master will not be liable for the injury. Where, however, one servant is injured by the negligence of another servant of the common master, but not within this description of fellow-servant, the master will be liable. *Joliet Steel Co. v. Shields*, 209.

2. *Negligence of servant in charge—injury to another servant—liability of the master.* A declaration in a suit by a servant against a coal company, showed that the defendant was the owner and operator of a coal mine, and had in its employ a pit boss, to whom it had given authority to direct and control the labors of those employed in its mine; that plaintiff was employed by defendant to labor in the mine, under the direction and control of the pit boss, and was so laboring; that the pit boss, knowing that there was loose overhanging rock in the roof of the mine, insufficiently braced to prevent its falling and doing great personal injury, falsely represented to plaintiff that there was no danger to be apprehended from the overhanging rock, and directed him to work under such loose rock in the roofing of the mine, and that plaintiff did then, pursuant to such directions, work thereunder, and while doing so, and without fault on his part, said overhanging rock fell from the roofing of the mine upon him, and severely wounded and injured him: *Held*, that the facts so alleged make a *prima facie* case of negligence. *Consolidated Coal Co. v. Wombacher*, 57.

3. Where the negligent act of one servant causing injury to another is the direct result of the authority conferred on the former by the master over the servant injured, the master will be liable for such injury. In such case, the servant whose negligent act causes the injury, stands in the place of the master, and the servant injured has no discretion or independent judgment of his own, but owes the same duty of obedience that he would if the master were himself acting. *Ibid.* 57.

MASTER AND SERVANT.**NEGLIGENCE OF ANOTHER SERVANT. *Continued.***

4. *Notice to agent in charge—presumption.* An agent or boss of a mining company, having charge of the mining operations and of the servants employed in the work, and power to direct and control them, will be presumed to have notice of the danger of a particular service he requires of a workman, and his neglect to inform the workman of such danger will be the negligence of the mining company. *Consolidated Coal Co. v. Wombacher*, 57.

5. *When master estopped to deny an agent's or servant's authority.* Where a master permits his agent in charge of a mine to direct and control the workmen therein employed, as to the place they shall work, he will be estopped, when sued by a servant for an injury resulting from the negligent act of his agent, to deny the authority of the agent to direct the servant injured to work in a dangerous place. *Ibid.* 57.

6. *Servant assuming risks of service—when entitled to notice.* A servant, in entering upon an employment, assumes only such risks as he has notice of, either express or implied; and it is culpable negligence on the part of the master to fail to notify him of risks which are not patent, and of which he is not cognizant from the nature of his employment. *Ibid.* 57.

7. *Directions given by master.* In an action against a master to recover for negligence of his servant, the former can not prove the directions he gave his servant, as the servant's failure to obey instructions will not exonerate him from liability. *Consolidated Ice Machine Co. et al. v. Keifer, Admr.* 481.

PLEADING—OF THE DECLARATION.

8. *To charge the common master for injury to one servant from the negligence of another.* See **PLEADING**, 1, 2.

MEASURE OF DAMAGES.

IN CONDEMNATION PROCEEDING. See **EMINENT DOMAIN**, 3 to 6.

MECHANIC'S LIEN. See **LIENS**, 1 to 7.

MINING RIGHT.

AS A SUBJECT OF TAXATION. See **TAXATION AND TAX TITLES**, 8, 9.

MORTGAGES AND DEEDS OF TRUST.**DEED ABSOLUTE IN FORM.**

1. *Whether only a mortgage.* A deed absolute in form, if intended as a security, is, in equity, but a mortgage, and will be treated and enforced as such, even though the agreement for redemption rests only in parol, and notwithstanding the Statute of Frauds. *Scanlan et al. v. Scanlan*, 630.

MORTGAGES AND DEEDS OF TRUST. *Continued.***MORTGAGOR AND MORTGAGEE.**

2. *Dealings between them—vesting the entire estate in the latter.* Where a mortgage is in the form of an absolute conveyance, a *bona fide* agreement between the parties to vest the entire estate in the mortgagee will be sustained, and the execution of a formal deed will not be required, provided the transaction is fair, and not attended with oppression or fraud or undue influence, and the mortgagee has not availed himself of his position to obtain an advantage over the mortgagor. *Scanlan et al. v. Scanlan*, 630.

3. Where a party holding the legal title of real estate as a security for loans and advances, purchases the equity of redemption of his debtor under circumstances showing no grounds for the surmise of any concealment or advantage taken of information acquired as mortgagee, and the consideration paid is an adequate one, a court of equity will not set such purchase aside. *Ibid.* 630.

SALE UNDER TRUST DEED.

4. *Conveyance by trustee—equity of redemption reserved.* Where a trustee makes a sale of the mortgaged property to another, for the use of the former, and to cut off subsequent incumbrances and liens, with an agreement that the debtor may still redeem the property by paying the debt thereby secured, the legal effect of the trustee's deed will be merely to put the legal title in the grantee, and the equity will not be cut off, and a purchaser from the grantee in the trustee's deed, with notice of the facts, will also take subject to the right of redemption. *Ibid.* 630.

JUNIOR MORTGAGEE.

5. *Not a party.* Unless the holder of a junior mortgage is made a party to a suit to foreclose a senior mortgage, the decree of foreclosure therein will not bar his rights or his equity of redemption. *Cheney v. Patton et al.* 422.

MUNICIPAL CORPORATIONS.**LOCAL IMPROVEMENTS.**

1. *By special taxation.* See SPECIAL ASSESSMENTS AND SPECIAL TAXATION.

PARK DISTRICT.

2. *As a quasi municipal corporation.* See PARKS, 2, 3.

MUNICIPAL INDEBTEDNESS.**CONSTITUTIONAL LIMITATION.**

1. *Upon what valuation or assessment to be based.* It is held in this case that it is the value of the taxable property of the county, to be ascertained by the "last assessment for State and county taxes previous to the incurring of" an indebtedness, that is, the assess-

MUNICIPAL INDEBTEDNESS.**CONSTITUTIONAL LIMITATION. *Continued.***

ment made by the local assessor, upon which the five per cent is to be computed which limits the power of the county to contract a debt, and not the equalized valuation as fixed by the State Board of Equalization. But this decision is overruled in the later case of *Culbertson et al. v. The City of Fulton et al.* 127 Ill. 30, where it is held, that it is the assessment as finally fixed by the State Board of Equalization that must govern, in determining the basis of the limitation of the power to create municipal indebtedness. *The People ex rel. Standerfer v. Hamill*, 666.

MUNICIPAL SUBSCRIPTIONS AND BONDS.**BONDS ISSUED WITHOUT LAWFUL AUTHORITY.**

1. *Are void.* It is the doctrine of this court that municipal bonds issued for stock in railroad corporations without authority of law, are void, no matter into whose hands they may come, and the collection of taxes levied to pay the interest on the same may be enjoined. *The People ex rel. Standerfer v. Hamill*, 666.

DONATION IN AID OF RAILROADS.

2. *Voted prior to constitution of 1870.* Where a county donation of bonds in aid of a railway is properly authorized under laws existing prior to the adoption of the constitution of 1870, by a vote of the people, under such laws, the bonds of the county may be issued under such authority after that constitution took effect, and they will be binding on the county so issuing them. *Ibid.* 666.

ST. LOUIS AND SOUTHEASTERN RAILROAD COMPANY.

3. *County subscription to stock—act of 1869—constitutionality—title of the act.* See STATUTES, 4, 5.

NEGLECTANCE.**CONCURRING NEGLIGENCE OF SEVERAL.**

1. *Joint liability.* If two or more persons are jointly concerned in a particular act which occasions injury to another, they may be sued jointly, and all persons who co-operate in an act directly causing injury are jointly liable for its consequences, if they act in concert, or unite in causing a single injury, even though acting independently of each other. *Consolidated Ice Machine Co. et al. v. Keifer, Admr.* 481.

2. So where the negligence of two or more persons directly concurs to produce an injury to another, although one may have undertaken one part of the particular work and another another part, and the negligence occurs in the performance of each of the several parts of the work which directly contributes to produce the injury, all will be liable. *Ibid.* 481.

NEGLIGENCE. CONCURRING NEGLIGENCE OF SEVERAL. *Continued.*

3. Where the owner of a brewery employs another to erect for him a refrigerator for making ice, and undertakes to furnish a support for the tank to be used as a part of the plant, and the other is to put up the tank, etc., it will be the duty of each party, in the performance of his part of the work, to use reasonable care to avoid injury to the servants of either and to third persons. *Consolidated Ice Machine Co. et al. v. Keifer, Admr.* 481.

4. An ice machine company undertook to erect for a brewery company a refrigerator plant, which included a large iron tank. The latter company was to fix the location for the plant, and make and put in proper supports for the tank. When the supports were completed the agent of the machine company notified the president of the brewery company that they were not sufficient, but afterward, with this knowledge on the part of both companies, the agent of the machine company, with the approval of the brewery company, put the tank upon these insufficient supports, and commenced filling it with water, and sent one of its servants on the roof, who had no notice of the danger, and while he was on the roof the supports of the tank gave way, which caused the servant to fall with the roof, whereby he was killed: *Held*, that the companies were jointly liable in an action by the personal representative of the servant killed. *Ibid.* 481.

5. *Evidence—to show notice.* In an action against two, where concurring negligence is alleged, proof that one defendant told his co-defendant that certain supports for a water tank which was proposed to be erected by the former for the latter, were not strong enough to sustain the weight of the tank, before the same gave way and caused the death of a servant, is competent evidence against both defendants, in an action to recover for the servant's death, to show that both defendants had notice of the insufficiency of the supports, and therefore both were guilty of negligence. *Ibid.* 481.

6. *Directions given by an agent—as affecting a question of negligence.* On a question of the joint negligence of two corporations resulting in the death of plaintiff's intestate, the directions of the superintendent of one of the companies to put certain work where the other company directed, are admissible as against his company. *Ibid.* 481.

PASSENGERS LEAVING RAILWAY TRAIN.

7. *Duty of the company—proper time to be allowed, etc.* If a conductor of a fast train receives fare from passengers to a station at which such train is not advertised or scheduled to stop, it becomes the duty of the conductor to notify the passengers so paying, that the train will not stop at that station, or to carry them to such sta-

NEGLIGENCE. PASSENGERS LEAVING RAILWAY TRAIN. Continued.

tion and then give them sufficient time to get off in safety. *McNulta, Receiver, v. Ensch*, 46.

8. A railway company, whose duty it was to stop its train within eight hundred feet of a railroad intersection, on approaching such intersection stopped momentarily at a station platform about five hundred feet from the same, such train not being obliged to stop at that station, and then started with a violent jerk, whereby a passenger was injured while attempting to get off, and then stopped again some fifty or sixty yards nearer the intersection: *Held*, that evidence of such facts was sufficient to authorize an instruction based on the neglect to stop the train at the station a sufficient time to enable the passenger to get off in safety. *Ibid.* 46.

9. Where a train is not bound to stop at a particular station to receive or discharge passengers, but is required by law to stop within eight hundred feet of a railway intersection, some five hundred feet beyond such station, but the proof showed that the conductor received fare to such station, and that there were passengers for that station, and on approaching the station the whistle was sounded and the speed of the train slackened, and the train was finally stopped, it was *held*, that a passenger on the train, in the absence of a contrary announcement, had the right to act on the belief that the stop was to enable passengers to get off, and that the company was liable for an injury to a passenger caused by starting the train before allowing a reasonable time to get off. *Ibid.* 46.

10. In case the conductor announces a station, at which his train is not bound to stop, just before the same is reached, and if, following such announcement, the train actually does stop at the station platform, a passenger for such station would be justified in presuming it was for the purpose of discharging him there, and in proceeding to get off; and if, while it is so stopped, and with due promptness and care, the passenger attempts to get off, and is thrown down and injured by the starting up of the train, that presumption would become conclusive on the company. It could not avoid liability for such injury by stopping the train again a few rods further on. *Ibid.* 46.

11. Where the ordinary signal is given on approaching a station, and it is announced in the usual manner by the brakeman or conductor, so as to lead a passenger to believe the train was going to stop at such station, and it does stop there, the company can not avoid liability to the passenger for an injury caused by the train starting before he has time to get off, by showing those in charge of the train intended to go on further before discharging passengers, of which no notice was given. *Ibid.* 46.

NEGLIGENCE. *Continued.*

INJURY AT RAILROAD CROSSING.

12. *Duty of flagman to give timely warning—right of the public to rely thereon.* It is the duty of a flagman stationed at a public highway crossing by a railway company, to know and give timely warning of the near approach of trains, and the public will have a right to rely upon a reasonable performance of that duty. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

13. *Flagman improperly signaling to cross.* It is gross negligence for the flagman of a railway company at a street crossing to signal to a traveler to drive his team and wagon upon the railway track when he knows that a passenger train is approaching the crossing without blowing a whistle or ringing a bell, and the view of the approaching train is obstructed by cars left on the side-tracks, and by buildings. *Ibid.* 586.

14. A count in a declaration in an action against a railway company, for negligence, resulting in a personal injury at a highway crossing, alleged an obstruction of the view from the highway by cars and buildings, and that the flagman of the company, well knowing the near approach of a train, recklessly, negligently and willfully beckoned to the plaintiff to drive upon the tracks, etc. There was proof on the trial, not only that the flagman beckoned the plaintiff to cross over the tracks, but that he did this negligently and recklessly, when he knew the train was coming: *Held*, that there was sufficient evidence to authorize an instruction based upon the negligence charged in the count. *Ibid.* 586.

15. *Signal by flagman not to cross—but not in proper time—other precautions neglected—care required of persons seeking to cross a railway track.* The mere fact that a party injured by a collision at a highway crossing was signaled by a flagman stationed there not to cross the tracks, will not relieve the railway company from liability for neglecting to lower the gates on the approach of a train, and to sound a bell or whistle, and in running its train at a rate of speed prohibited by an ordinance, if the signal to stop is not given in time for the party injured to avoid the injury by the exercise of ordinary care. Any warning in such a case is not sufficient to prevent a recovery. *Ibid.* 586.

16. In an action against a railway company the defendant asked this instruction: "If the jury believe, from the evidence, that the flagman on the crossing did not flag the plaintiff to cross the tracks at all, and if the jury further believe, from the evidence, that he signaled the plaintiff not to cross, then the jury are instructed, as a matter of law, that the plaintiff is not entitled to recover in this case, even if the jury should also find, from the evidence, that the gates were not lowered on the crossing, that no bell was rung or

NEGLIGENCE. INJURY AT RAILROAD CROSSING. *Continued.*

whistle sounded, and that the train was moving at a rate of speed in excess of that prescribed by the ordinances of the town." The court modified the same by inserting after the words "not to cross," the words, "in time for the plaintiff, by the exercise of reasonable care, to have avoided the injury:" *Held*, that the modification was manifestly proper. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

17. In such case, the defendant asked the court to instruct the jury, that if the witness, P., attempted to prevent the plaintiff from crossing, in time to avoid the injury, then there could be no recovery, which was refused as asked: *Held*, properly refused, as ignoring the question whether the plaintiff had notice or knowledge of such attempt. *Ibid.* 586.

18. In the same case, the defendant asked this instruction: "The jury are instructed, as a matter of law, that under the evidence in this case the plaintiff is not entitled to recover, even if the jury believe, from the evidence, that the flagman signaled him to come across the track, and if the jury also believe, from the evidence, that no bell was rung or whistle sounded, provided the jury believe, from the evidence, that the plaintiff could, by looking and listening, have discovered the approach of the train in season to avoid the accident complained of," which was refused as asked: *Held*, properly refused, as it deprived the plaintiff, as matter of law and wholly regardless of the surrounding circumstances, of the right to place any reliance upon the signals given by the flagman. *Ibid.* 586.

19. The court modified the instruction by striking out all after the word "plaintiff," where it last occurred, and substituting therefor the words, "did not exercise ordinary and reasonable care, under all the circumstances as shown by the evidence, to discover the approach of the train and prevent being injured:" *Held*, that the instruction, as modified, expressed the law substantially as stated by this court in prior cases. *Ibid.* 586.

20. Where a public street was crossed by two main tracks and twenty side-tracks of a railway company, and a flagman was stationed at such crossing to give warning of danger to any one about to cross the tracks, and plaintiff was injured by a collision in attempting to pass over the railroad tracks, it was *held*, on the trial of an action by him against the company, no error to refuse to instruct the jury that the plaintiff was under an obligation, while driving across the tracks, before driving over any particular track, to look and listen for a train that might be approaching upon any of the tracks, and that the obligation which the law imposed upon him would not be satisfied by looking and listening before driving upon the first track, but that the exercise of such care and caution

NEGLIGENCE. INJURY AT RAILROAD CROSSING. Continued.

on his part should have existed while driving over all of the tracks. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

21. *Duty of passenger to seek a safer crossing.* The mere fact that by going several blocks out of his direct course a party might have crossed a railroad at a place where there were fewer tracks and the crossing was safer, which he fails to do, does not necessarily, and as a matter of law, charge him with a want of ordinary care. This case is distinguished from *City of Centralia v. Krouse*, 64 Ill. 19. *Ibid.* 586.

22. It is not *per se* negligence in a party to attempt to pass over railroad tracks crossing a public street generally traveled, and guarded by a watch tower, and by gates across the street on both sides of the tracks, when a watchman is also stationed there, both night and day, to warn persons of danger. To hold this negligence would be tantamount to closing the street as a public highway. *Ibid.* 586.

CONTRIBUTORY NEGLIGENCE.

23. *Matter of defense—requisites of the declaration.* In an action by a servant against a mining company, to recover for a personal injury received from falling rock while working in a place where he was directed, on the assurance of the company that there was no danger, whether the plaintiff was guilty of contributory negligence by knowing the danger and failing to observe due care to avoid it, if susceptible of proof, is a matter of defense which need not be anticipated or negated in the declaration. *Consolidated Coal Co. v. Wombacher*, 57.

MASTER AND SERVANT.

24. *Negligence—resulting in injury to the latter.* See MASTER AND SERVANT, 1 to 7.

NEW TRIALS.**NEWLY DISCOVERED EVIDENCE.**

1. Newly discovered evidence which is merely cumulative and inconclusive is no ground for a new trial. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

DISREGARDING ERRONEOUS INSTRUCTION.

2. A new trial will not be granted because the jury may disregard an erroneous instruction, as no legal wrong is thereby done to the party at whose instance the instruction was given. *McNulta, Receiver, v. Ensch*, 46.

NOTICE.**WHEN NOTICE REQUIRED—AND REQUISITES.**

1. *In attachment—notice to the debtor.* See ATTACHMENT, 1.

NOTICE. WHEN NOTICE REQUIRED—AND REQUISITES. *Continued.*

2. *Case taken under advisement—of the judgment.* See **PRAC-TICE**, 2.
3. *Judicial sale—irregularities.* See **SALES**, 10.
4. *Drainage matters—additional assessment.* See **DRAINAGE LAW**, 7.
5. *Change of plan of drainage—of a second assessment.* Same title, 10.
6. *Classification of lands for drainage—and further assessment.* Same title, 8, 9.
7. *Enlargement of drainage district.* Same title, 11.
8. *Modification of prior orders of court, as to drainage assessments.* Same title, 13.
9. *Servant taking risks of service—notice of danger.* See **MASTER AND SERVANT**, 6.
10. *Notice to master of danger of service—presumption.* Same title, 4.

NUISANCE.

WHAT MAY CONSTITUTE A NUISANCE.

1. *By reason of its locality.* A coal shed for the loading, unloading and storing of coal by the use of machinery, though not a nuisance *per se*, may be such from the particular locality in which it is situated, as, in a thickly populated part of a city. *Wylie et al. v. Elwood*, 281.

OF A PUBLIC AND A PRIVATE NUISANCE.

2. *Remedy.* The general rule is, that public or common nuisances can only be proceeded against by indictment; but it is also a well established rule, that when a person sustains from a public nuisance a special damage different from that common to all, he may have his action therefor. The doctrine now is, that a nuisance may be at the same time both public and private. *Ibid.* 281.

3. An individual who receives actual damage from a nuisance may maintain a private suit for his own injury, although there may be many others in the same situation. So the use of a steam engine in a crowded street may be a public nuisance, but if the smoke from it injures a man's goods in his shop or house, and makes his dwelling uncomfortable, he will have a right of action. *Ibid.* 281.

4. If one is injured in the enjoyment of his residence in a populous part of a city, from the erection and operation of a large coal shed, by noises from the use of machinery, and the grinding of coal in being moved, loaded or unloaded, and from deposit of dust, etc., he may have his action against the author of the nuisance;

NUISANCE. OF A PUBLIC AND A PRIVATE NUISANCE. Continued.

and it is no defense to show that the same act inflicted a like injury upon many others. *Wylie et al. v. Elwood*, 281.

EVIDENCE.

5. *To show character and extent of injury.* In an action on the case, to recover damages from the operation of a coal shed, and the handling of coal by machinery propelled by steam, in a populous part of a city, many owners and occupants of buildings in the vicinity were admitted to testify that they also were annoyed and injured by the noises and coal dust, in the use of their property: *Held*, admissible to show the character and extent of the plaintiffs injury, and as tending to prove that the nuisance was capable of inflicting the injury complained of. *Ibid.* 281.

OUTSTANDING TITLE.

BY WHOM TO BE ASSERTED. See **EJECTMENT**, 1, 2.

PARKS.**CONNECTING STREETS, ETC.**

1. *Power of commissioners—a continuing one.* The power given to park commissioners by the act of 1879, "to connect any public park, boulevard or driveway under its control, with any part of an incorporated city, town or village, by selecting and taking any connecting street or streets, or parts thereof, leading to such park, provided," etc., is not exhausted by one exercise of it, but is a continuing power, and the commissioners may select a street a second time, even though the street last taken runs parallel with the one first taken. They may select such connection between a park and the city as the public convenience may demand. *West Chicago Park Comrs. v. McMullen et al.* 170.

PARK DISTRICTS.

2. *As quasi municipal corporations—and subject to legislative control.* A park district, when established by a vote of the people, becomes a quasi municipal corporation for certain purposes, after which the corporation is subject to legislative control. Its powers may be changed, abridged or enlarged, over any portion of the territory within the original limits of the district, without any further vote of the people. *Ibid.* 170.

3. So on the adoption of the West Chicago Park act by a vote of the people included in the park district, such district thereby became a quasi municipal corporation for park purposes, and the board of park commissioners created by such act became the corporate officers thereof, and one of the agencies of the State for carrying on the government in respect to the parks in such district. *Ibid.* 170.

PARTIES.

CREDITOR'S BILL.

1. *To set aside a judgment by confession.* Where a judgment by confession has been entered in the name of a mere assignee without actual interest, a creditor's bill may be prosecuted in the name of the nominal plaintiff in the judgment, where the defendant is deprived of no defense he might have had if the suit had been in the name of the beneficial plaintiff. *Atkinson et al. v. Foster*, 472.

2. *To set aside fraudulent conveyance.* A having but a life estate, with two others, the owners of the remainder, conveyed the same, by warranty deed, for the purpose of defrauding their creditor. On bill by the creditor to set aside the deed, he failed to make the representatives of A, who had died, parties: *Held*, that the representatives of A, deceased, were necessary parties, by reason of the covenants of warranty in the deed. *Johnson et al. v. Huber*, 511.

3. *Married woman—whether she may sue alone.* A married woman may maintain a creditor's bill in her own name, to set aside a conveyance by the debtor in fraud of her rights, although, if the complainant in such case be a *feme covert* residing with her husband in another State at the time of the filing of her bill, it would be advisable to join the husband as complainant. *Ibid.* 511.

ON BILL TO DISSOLVE INSOLVENT CORPORATION.

4. *And to appoint a receiver.* The stockholders are not necessary parties to a bill by creditors to dissolve an insolvent corporation, and have a receiver appointed to wind up its affairs. The court acquires jurisdiction to appoint a receiver of corporate assets upon service of process on the corporation. *Bates et al. v. Great Western Telegraph Co. et al.* 536.

SUITS UNDER BURNT RECORDS ACT.

5. *Of the proper parties.* In a proceeding under the Burnt Records act, all persons claiming the title or any interest in the land are required to be made parties, and they are required, by answer or otherwise, to set forth their claims of title, and to establish the same by proof; and it is made the duty of the court to adjudicate in respect to all conflicting titles or claims. *Gage v. DuPuy*, 132.

WANT OF PROPER PARTIES.

6. *How availed of.* By the rules of correct practice, an objection to a bill in chancery for want of proper parties should be taken by demurrer, plea or answer; but when the omitted party is not only a proper but also a necessary party, so that a final decree can not be rendered without affecting his or her interests, the objection may be taken at the hearing, or on appeal or error. *Johnson et al. v. Huber*, 511.

7. *Time to object.* If the latter is also a proper party, the objection that he is not made a party should be raised in the trial court, or it will be waived. *Atkinson et al. v. Foster*, 472.

PARTIES. Continued.**AS TO ONE NOT A PARTY.**

8. *Decree not binding.* See MORTGAGES AND DEEDS OF TRUST, 5.

PARTITION.**SALE UNDER DECREE.**

1. *Not until after report of commissioners.* In a proceeding for the partition of land, whether in equity or under the statute, it is an essential prerequisite to a decree of sale that commissioners shall have been appointed, and they report that the land is not susceptible of partition. Section 16 of the Partition act is mandatory, and when partition is sought by either mode, a decree for a sale is erroneous, unless based upon a report of commissioners. *Coffin et al. v. Argo et al.* 276.

PARTNERSHIP.**POWERS OF PARTNERS.**

1. *To give warrant of attorney to confess judgment—ratification—presumption.* One partner may sign the firm name to a note given in the ordinary course of business for a firm debt. *Hier et al. v. Kaufman et al.* 215.

2. But one partner can not execute a warrant of attorney to confess a judgment in the firm name, without express authority from the other partner, or the ratification of the act by the latter. *Ibid.* 215.

3. Where judgment notes, however, are signed in the firm name by one partner, alone, but with the assent of the other partner, he making no objection thereto, the authority to sign the firm name, or the ratification of the act, must be presumed. *Ibid.* 215.

PASSENGERS.

Expulsion from railroad train. See RAILROADS, 1, 2, 3.

PAYMENT.**BY CHECK.**

1. Where a check is given for goods purchased, in the absence of an agreement that it is accepted as payment it is but a conditional payment; but when a check is accepted as cash, and payment for the goods is receipted, that may be regarded as a payment. *Batley et al. v. Partridge et al.* 188.

PENALTY.**FORFEITED LANDS.**

For taxes—not special assessments. See TAXATION AND TAX TITLES, 11, 12.

PERJURY. See CRIMINAL LAW, 16 to 19.

PLEADING.

OF THE DECLARATION.

1. *In order to charge the common master—for injury to one servant resulting from the negligence of another.* In an action by a servant against his master, it is not sufficient for the plaintiff merely to allege and prove an injury to himself from the negligence of the defendant's servants, generally. It should be averred and proved that the servants whose negligent acts are complained of, were not the fellow-servants of the plaintiff; and the omission of such allegation is not cured by the verdict, but is ground in arrest of judgment. *Joliet Steel Co. v. Shields*, 209.

2. Nothing will be presumed after verdict but what must have been necessarily proved under the averments of the declaration. Any presumption of proof of facts not alleged in a declaration will be rebutted by an instruction to find for the plaintiff, if the jury believe, from the evidence, that the plaintiff was injured in manner and form as charged in the declaration. *Ibid.* 209.

3. *Contributory negligence—as a matter of defense.* Contributory negligence of a servant to observe due care to avoid injury while in his master's service, is a matter of defense, which need not be anticipated or negated in the declaration. *Consolidated Coal Co. v. Wombacher*, 57.

PLEA—REPRESENTATIVE CAPACITY.

4. *Necessity of plea denying.* See RECEIVERS, 1.

CHANCERY.

5. *Pleading in chancery.* See CHANCERY.

PLEADING AND EVIDENCE.

SEVERAL COUNTS.

1. *Recovery upon one or more of them.* Where several different grounds of action as acts of negligence are alleged in several counts, the plaintiff will be entitled to recover if he proves, by a preponderance of the evidence, either ground of action. The burden is not on him to prove, by a preponderance of evidence, as a condition precedent to the right of recovery, each and all of the material acts of negligence in each and all the counts. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

PLEDGE.

DELIVERY TO PLEDGEE.

1. *As against creditor's bill.* A pledge of property can only be sustained against persons acquiring a lien by creditor's bill, when the thing pledged is actually delivered to the pledgee. In fact, a

PLEDGE. DELIVERY TO PLEDGEE. Continued.

pledge, strictly speaking, can only be made by delivery. *Atkinson et al. v. Foster*, 472.

2. A holder of certificates of stock in an incorporated company, for the purpose of securing a creditor, made an assignment thereof by a separate writing, but never indorsed, or transferred the certificates on the books of the company, or otherwise, but retained possession of them as before. While so holding the certificates they were seized by the receiver of such holder on a creditor's bill, without notice of the attempted assignment: *Held*, that the assignment passed no title as against the creditors. *Ibid.* 472.

POSSESSION.**FORCIBLE ENTRY AND DETAINER.**

1. *A possessory action only.* See **FORCIBLE ENTRY AND DETAINER**, 1, 2.

POSSESSION OF EXPLOSIVES.

2. *As evidence of criminal intent.* See **CRIMINAL LAW**, 14.

POSSESSION OF STOLEN GOODS.

3. *As evidence of guilt.* Same title, 24.

POWERS OF SEVERAL.

ALL MUST ACT. See **EMINENT DOMAIN**, 1, 2.

PRACTICE.**CHANGING FORM OF ACTION.**

1. After an action of *assumpsit* had been once tried, and the judgment reversed and the cause remanded, and the parties had made their opening statements to the jury, the court, on its own motion, and against the plaintiff's protest, discharged the jury, and ordered that the action be changed to an action of account, and that the parties account each with the other, and appointed an auditor to take the account: *Held*, that the course pursued by the trial court was irregular, and arbitrary in the extreme. *Pardridge et al v. Ryan*, 247.

TAKING CASE UNDER ADVISEMENT.

2. *Entry of judgment as of a preceding term.* The county court, after the hearing of objections to the confirmation of special assessments upon lands in a drainage district, has the right to take the case under advisement for a reasonable time; but the propriety of the practice of entering judgment at a succeeding term as of the one at which the hearing was had, will not be considered when no injury can result therefrom. *Hoemer v. Hunt Drainage District*, 360.

PRACTICE. *Continued.*

TIME TO OBJECT.

3. *Defects in declaration.* If a declaration, or count thereof, in an action for negligence, is defective, in failing to aver due care on the part of the plaintiff, the defendant should demur, or call the attention of the court to it in some other way, before final judgment, so as to afford an opportunity to obviate the defect by amendment. Such defects are cured by the verdict. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

4. *For irregularities on confession of judgment.* If a defendant in a judgment entered by confession desires to take advantage of mere irregularities in the entry of the judgment, it must be by application to the court in which it was entered. *Atkinson et al. v. Foster*, 472.

5. *For a variance.* An objection that there is a variance between the declaration and the proofs, when made for the first time on appeal or error, comes too late. *Consolidated Coal Co. v. Wombacher*, 57.

6. *Change of venue—regularity of proceedings—objection waived after verdict.* An objection to the sufficiency of the clerk's certificate to the transcript of the proceedings on a change of venue is waived by the party going into the trial. All objections to the regularity of the proceedings in obtaining a change of venue, and the jurisdiction of the court to which the case is sent, are waived by the verdict. *Langford v. The People*, 444.

7. *A motion in a forcible entry and detainer suit to quash the complaint and dismiss the cause, for the reason that the description of the premises is insufficient, and for want of a demand, comes too late after the jury has been impaneled and the trial commenced.* *Stillman v. Palis*, 532.

8. *Want of parties—time to object.* See PARTIES, 7.

SPECIFIC OBJECTION.

9. *Variance.* If there is a variance between the allegations of the plaintiff's declaration and the proofs, the objection should be made in the trial court, so as to afford an opportunity to amend. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

OBJECTIONS TO PARTICULAR COUNTS.

10. Instructions directing the jury to disregard the several counts in a declaration which fail to call the attention of either court or jury to any supposed defects of either of such counts, are properly refused. *Ibid.* 586.

SPECIAL QUESTIONS TO JURY.

11. There is no error in refusing to submit special questions of fact to the jury for answer, when such answers, if returned, would settle nothing. *Penn Mutual Life Ins. Co. v. Keach*, 583.

PRACTICE. SPECIAL QUESTIONS TO JURY. *Continued.*

12. Nor is there error in refusing to submit to the jury special questions of fact which are merely of an evidentiary character. *Chicago, Rock Island and Pacific Ry. Co. v. Clough*, 586.

LIMITING NUMBER OF WITNESSES.

13. The trial court must of necessity exercise a discretion as to the number of witnesses to prove a given fact that is not disputed, or that is collateral to the main issue, depending very much upon the nature and subject matter of the inquiry. Where a particular point appears to the court to be satisfactorily established, the calling of further witnesses may be stopped, subject, however, to the right to recall, should the point be subsequently disputed. *Green v. Phoenix Mutual Life Ins. Co. et al.* 310.

14. On the hearing of a cause in chancery involving the sanity of the complainant at a former period, as affecting his capacity to execute certain deeds of trust involved in the litigation, after the examination of eight witnesses by complainant on that question, the court limited the parties each to nine witnesses, including those already examined on the question of sanity, and found the issue for the defendants: *Held*, that the court erred in limiting the number of witnesses, especially so after the complainant had examined the greater part of his nine witnesses before the rule was announced. *Ibid.* 310.

15. If the power of the trial court to limit the number of witnesses, as so exercised, existed, which was not conceded, it should have been done at the beginning of the trial, so as to give each party an opportunity of selecting such witnesses as he might have deemed most important. *Ibid.* 310.

16. Even if the court, in a condemnation proceeding, has the power, in its discretion, to limit the number of witnesses who shall be examined, or to limit the number of witnesses whose fees and costs shall be taxed against the petitioner, it can not be said that the failure to exercise that discretion is of itself an abuse of discretion which may be reviewed. *Chicago, Peoria and St. Louis Ry. Co. v. Aldrich*, 9.

DIRECTING WHAT THE VERDICT SHALL BE.

17. Where the evidence given at the trial of a cause, with all the inferences that can justifiably be drawn from it, is so insufficient to support a verdict for the plaintiff that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant. This rule applies on bill filed to contest a will. *Purdy v. Hall et al.* 298.

18. Where the evidence on the part of the contestant of a will, in the absence of any rebutting testimony on the part of the proponents, is such as to justify a verdict setting aside the will, it will be

PRACTICE. DIRECTING WHAT THE VERDICT SHALL BE. *Continued.*

error for the court to direct the jury to find a verdict in favor of the will. *Purdy v. Hall et al.* 298.

19. In this case, on bill to set aside a will, it was alleged that the testator was induced to sign the same by undue influence, fraud and compulsion on the part of the principal devisees, and that they misrepresented to him the contents of the instrument which he signed. There was no proof that the will signed was ever read to the testator, and it appeared that the principal devisee, instead of procuring the person to write the will desired by the testator, brought another lawyer of his own selection, and the will was drawn by such lawyer in the presence of the testator and such devisee, and there was proof tending to show that an undue influence was exercised. The court below directed the jury to find for the proponents of the will: *Held*, that the court erred in so directing the verdict; and that the evidence should have been left to the jury. *Ibid.* 298.

IMPROPER REMARKS OF COUNSEL.

20. *In argument, to the jury.* A new trial will not be awarded for the improper conduct of counsel, in his argument to the jury, in stating facts not in evidence, when the trial court promptly stops the counsel and tells the jury to disregard the remarks, and properly instructs as to them, and it does not appear that the jury were influenced by such remarks. *Chicago City Ry. Co. v. Pelletier*, 120.

RECALLING WITNESS.

21. *To lay the foundation to impeach him.* See WITNESSES, 11.

CHALLENGE OF JUROR.

22. *Mode of preserving rulings thereon.* See JURY, 3.

PRACTICE IN THE SUPREME COURT.**ASSIGNMENT OF ERROR.**

1. *A party will not be allowed to complain of an error that does not injuriously affect him or his interests.* So where a defendant in a suit under the Burnt Records act claims no title to the premises to be affected by the decree rendered, he can not be allowed to assign for error that such decree is not broad enough to protect him. *Gage v. DuPuy*, 132.

2. *As to an order entered by consent.* Where the defendant in an action of assumpsit assents to an order made by the court on its own motion, changing the form of action to that of account, and makes no objection to the appointment of an auditor or the taking of an account, he will be estopped from assigning such action of the court for error. He will be estopped from complaining of what he agreed to in the court below. *Pardridge et al. v. Ryan*, 247.

3. *Error must appear from the record.* When the record fails to show the jury fees in a proceeding for condemnation were charged

PRACTICE IN THE SUPREME COURT.

ASSIGNMENT OF ERROR. *Continued.*

to the petitioner, error can not be assigned by the petitioner upon a denial of a motion to strike the jury fees from the fee book. *Chicago, Peoria and St. Louis Ry. Co. v. Aldrich*, 9.

PRESUMPTION.

4. *In support of the judgment below.* On appeal or error, every reasonable intendment not negated by the record, which goes to support the judgment, must prevail. *Ibid.* 9.

ERROR AFTER VERDICT.

5. *Remandment with direction to enter the proper judgment.* Where the only error in a case consists in the form and effect of the judgment, a *venire facias de novo* will not be awarded on a reversal, but the cause should be remanded, with instructions to the trial court to enter the proper judgment.* *McNulta, Receiver, v. Ensich*, 46.

PRESUMPTIONS.

OF LAW AND FACT.

1. *In the matter of jurisdiction.* See JURISDICTION, 1, 2, 3.
2. *Construction of the constitution—adopting provisions of prior constitution, and the construction thereof—presumption.* See CONSTITUTIONAL LAW, 1.
3. *Taxation of corporations—return by corporation to the State Board of Equalization—presumption.* See TAXATION AND TAX TITLES, 7.
4. *Danger of service—notice to the master—in case of injury to servant.* See MASTER AND SERVANT, 4.
5. *On question of sanity or insanity.* See INSANITY, 1.
6. *Trust fund in hands of agent—presumption that it is the identical fund.* See TRUSTS AND TRUSTEES, 3, 4.
7. *In support of judgment below, on error.* See PRACTICE IN THE SUPREME COURT, 4.
8. *Challenge of juror—presumption in favor of ruling thereon.* See JURY, 2, 3.
9. *In favor of action of Appellate Court.* See APPEALS AND WRITS OF ERROR, 6.
10. *Jurisdiction of county court—in favor of its judgment.* See ADMINISTRATION OF ESTATES, 1, 2.
11. *After verdict—presumption in aid thereof.* See PLEADING, 2.
12. *Will—presumption that the testator had knowledge of contents.* See WILLS, 21, 22.

*See *Meyer v. Village of Teutopolis*, 131 Ill. 552, and *Harris v. The People*, 130 id. 457.

PRIVITY.

IN ESTATE OR INTEREST.

As between administrator and heir. See ADMINISTRATION OF ESTATES, 8.

PROBATE COURT.

PRESERVING THE EVIDENCE.

1. *In what way.* There is no mode by which the evidence given in a proceeding before the probate court can be lawfully preserved and made a part of the record. *Blair v. Sennott*, 78.

2. The remedy for error of the probate court in ruling upon the evidence is by appeal to the circuit court, and this is adequate. *Ibid.* 78.

PRESUMPTION.

3. *In support of the rulings of probate court.* Where the probate court has jurisdiction of the subject matter and of the persons of the parties, the same presumption in favor of the rulings of that court must be indulged in as in favor of the circuit court, under like circumstances. *Ibid.* 78.

PROCESS.

TO WHAT TERM RETURNABLE.

1. *A summons issued out of the county court*, in a proceeding to contest an election, made returnable to a term of the court beyond the second term after the teste of the writ, is void. *Cavanaugh v. McConochie*, 516.

WRIT ISSUED TO ANOTHER COUNTY.

2. *Appearance—waiver—question of jurisdiction.* See JURISDICTION, 5.

QUO WARRANTO.

TO TEST LEGALITY OF INCORPORATION. See CORPORATIONS, 1, 2, 3.

RAILROADS.

STREET RAILWAYS.

1. *Improper conduct of passenger—as, in the use of indecent language—right of expulsion, etc.* While a conductor of a street railway car is justified in expelling a passenger for the use of vulgar and indecent language to the annoyance of other passengers, still the law does not justify unreasonable and excessive force, or permit the removal of such passenger from the car at a place or under circumstances dangerous to life or limb. *Chicago City Ry. Co. v. Pelletier*, 120.

2. But the conductor has no right to put a passenger off his car for the use of vulgar and indecent language in a tone loud enough

RAILROADS. STREET RAILWAYS. Continued.

to attract the attention of other passengers, and refusing to desist, unless such language is calculated to annoy and disturb them. *Chicago City Ry. Co. v. Pelletier*, 120.

3. Railway companies are not conservators of the public or private morals, but they may and should adopt and enforce such reasonable rules as will protect their passengers from injury, insult, disturbance or annoyance. Their duty to prevent the use of offensive language on their cars is for the protection of their passengers, and arises out of their duty to passengers. *Ibid.* 120.

DISCHARGING PASSENGERS.

4. *Giving proper time.* See **NEGLIGENCE**, 7 to 11.

HIGHWAY CROSSINGS.

5. *Duty and liability.* Same title, 12 to 22.

RATIFICATION.**UNAUTHORIZED ACT OF AGENT.**

1. *Ratification by principal.* See **AGENCY**, 3, 4.

ACTS OF ONE PARTNER.

2. *As, making warrant of attorney to confess judgment—ratification by the other partners.* See **PARTNERSHIP**, 1, 2, 3.

REASONABLE DOUBT. See **CRIMINAL LAW**, 20, 21, 22.

RECEIVERS.**LIABILITY TO SUIT.**

1. *How questioned—admission.* An administrator or receiver, when sued in his representative capacity, admits that he is rightly so sued unless he files a plea denying the same. If he makes no objection to the suit against him in his representative capacity, before or on the trial, he will be precluded from afterward urging that he was not rightly sued. *McNulta, Receiver, v. Ensich*, 46.

JUDGMENT AGAINST RECEIVER.

2. *Only in his fiduciary character.* A judgment against a receiver creates no personal liability against him, and it is to be so entered as to be enforced only out of the funds of the corporation properly chargeable to him in the capacity of receiver. It is error to render judgment against him individually, and no award of execution should be made. The judgment must be against him as receiver, and be made payable out of the funds held by him as such, in the due course of administration. *Ibid.* 46.

RECITALS IN WILL.

WHETHER DEVISEES ESTOPPED. See **WILLS**, 12.

RECORD OF COURT PROCEEDINGS.**REFUSAL TO MAKE A PROPER RECORD.**

Remedy. See REMEDIES, 1.

RELEASE OF DAMAGES.**DEED FOR RIGHT OF WAY.**

Of damage accruing afterward—and as to land not granted. See RIGHT OF WAY, 1, 2, 3.

RELEASE OF SURETY.

BY EXTENSION OF TIME TO PRINCIPAL. See SURETY, 1, 2.

REMEDIES.**REFUSAL OF COURT TO MAKE A PROPER RECORD.**

1. *Remedy.* If a court refuses to make a proper record of its proceedings, the remedy is by *mandamus*, and not by *certiorari*. *Blair v. Sennott*, 78.

2. *To question legality of corporation.* See CORPORATIONS, 1, 2, 3.

3. *Irregularities in judgment by confession.* See CONFESSION OF JUDGMENT, 3.

4. *For over-assessment—for taxation.* See TAXATION AND TAX TITLES, 10.

5. *Excessive special assessments for drainage.* See DRAINAGE LAW, 18.

RENUNCIATION OF WILL.

BY THE WIDOW. See WILLS, 17.

REPEAL OF STATUTES.

BY SUBSTITUTION. See STATUTES, 11.

RESCISSION OF CONTRACT.

BOTH PARTIES IN DEFAULT. See CONTRACTS, 8, 9.

RESIDENCE—DRAINAGE DISTRICT.

FOR PURPOSES OF SUIT. See JURISDICTION, 6.

REVOCATION.**REVOCATION OF POWER.**

By death. See SURETY, 3.

RIGHT OF WAY.**BY GRANT OR DEED.**

1. *Damages as to land not included in the grant.* In 1854 the owner of land conveyed a part of it to a railway company, for right of way: *Held*, that such deed could not be held to release any subsequent damages as to the remaining land of the grantor by the use of the part conveyed for railway purposes. *Wylie et al. v. Elwood*, 281.

2. Under the constitution of 1870, where land has been acquired for railroad purposes by grant as well as by condemnation, all damages to the owner's land not taken, for which an action would lie at common law, are presumed to have been considered in fixing the price. But no such presumption arises in respect to deeds for right of way under the constitution of 1848. *Ibid.* 281.

3. The conveyance of a strip of land to a railway company will not give the grantee the right to make any use of it which would injuriously affect the remaining land of the grantor. The law annexes the condition that the owner of land shall so use it as not to produce injury to another. *Ibid.* 281.

PRESCRIPTION.

4. *Right of way by prescription.* See EASEMENT, 1, 2, 3.

SALES.**JUDICIAL SALES.**

1. *Confirmation of sale—improper conduct on the part of purchaser, officer, etc.—to prevent confirmation.* A sale of land by the master under a decree will not be approved by the court, if fraud or misconduct on the part of the purchaser, the officer conducting the sale, or other person connected therewith, is shown, or if it be made to appear that a party interested has been surprised or led into a mistake by the conduct of the purchaser, officer or other person connected therewith. Confirmation of such sale will not be refused, however, on the motion of an interested party, merely to protect him against the consequences of his own negligence, when he is under no disability to protect his own rights. *Barling et al. v. Peters, Receiver*, 606.

2. *As to sum to be bid—secret agreement—whether affecting validity of sale.* An agreement of a prospective bidder at a judicial sale, not a party to the decree, made with an interested party, to bid at the sale a certain amount necessary to a sale, and a higher sum named if compelled by competing bidders, although kept secret from the other parties to the suit and bidders, is not fraudulent, or calculated in any way to prejudice the rights of other parties in interest. A bidder is not bound to disclose the amount he is willing to bid, rather than lose the land. *Ibid.* 606.

SALES. JUDICIAL SALES. *Continued.*

3. A party whose interest it is to procure a certain price for a tract of land, and who may have agreed to bid to that amount, may lawfully contract with another person to induce him to become the purchaser at the same price he was to have bid, and such an agreement can not be said to be fraudulent, as stifling bidding or preventing competition. *Barling et al. v. Peters, Receiver*, 606.

4. A decree for the sale of land provided that there should be no sale unless at least \$600,000 was bid, and that out of the purchase money \$505,000 should be paid to certain parties for advances, etc., and also one-half of the balance. The other half of the balance was to be paid to a creditor of another one of the parties, then deceased, to the amount of \$83,000. The creditor, through a receiver, entered into a secret agreement with a third party, whereby the latter was to purchase the creditor's interest in the decree in case he became the purchaser of the land, and to bid, if necessary, \$760,000 to get the land. The sale was extensively advertised and conducted fairly. Such third party became the purchaser at \$602,000, which was a fair price, and it did not appear that any greater sum would be bid on a resale: *Held*, that there was no sufficient ground for refusing to approve the sale, and that a resale was properly denied. *Ibid.* 606.

5. *Inadequacy of price.* Where a judicial sale has been conducted in the usual manner, and the purchaser is a stranger to the order of sale, mere inadequacy of price will not justify a court in vacating the sale, so as to deprive the vendee of the benefit of his purchase, unless the inadequacy is such as to amount to evidence of fraud. *Ibid.* 606.

6. *Objections to confirmation—evidence—whether oral, or by affidavit.* Upon the hearing of objections to the confirmation of the master's report of a sale of land under a decree, it was proposed to place a witness upon the stand to be examined orally upon the questions involved. This the court refused to allow, and in so ruling there was no departure from the usual practice in such cases,—presenting the proofs by affidavit. It was not shown the matters could not be presented fully and fairly in that way, nor was it made to appear what was expected to be proven on the proposed oral examination. *Ibid.* 606.

SALES ON EXECUTION.

7. *To be supported by a proper judgment.* It is essential to a sale of land under an execution, that the process shall have a judgment of a court of competent jurisdiction on which to rest. If the execution issues without authority, it will be void. Therefore, it should show upon what judgment it is issued. *Anderson v. Gray*, 550.

8. *Judgment and execution—variance.* A variance between the Christian name of the nominal plaintiff in a judgment and in an

SALES. SALES ON EXECUTION. *Continued.*

execution issued thereon, and also as to the amount of the judgment, will not be fatal to a levy upon and sale of the debtor's land, if it appears from the whole record that the execution was in fact issued under the judgment. *Anderson v. Gray*, 550.

9. In a cause docketed as *Jane Mercer*, for the use of G. W. Hacker, against Humble and Peterson, the plaintiff obtained judgment against Peterson alone, and the cause was continued as to Humble, for the want of service in time on him. At the next term of the court the record showed a judgment in the case of *James Mercer*, for the use of G. W. Hacker, against Humble, for the same debt and damages as in the judgment of the preceding term. There was a levy of an execution upon land, and a sale. The execution, certificate of purchase and sheriff's deed recited a judgment in favor of James Mercer, for the use, etc., and against both Humble and Peterson, at the last named term. The proof showed there was but one suit for the use of Hacker: *Held*, that while the proceedings were irregular, it was evident that the execution issued in the suit of *Jane Mercer*, and that the sheriff's sale and deed passed the title of Peterson in the land levied upon. *Ibid.* 550.

10. *Plaintiff as the purchaser—chargeable with notice of irregularities.* Where the judgment creditor becomes the purchaser of property, he will be chargeable with notice of all irregularities in the proceedings. *Smith v. Huntoon et al.* 24.

11. *A voluntary assignee of a certificate of purchase*, purchasing from the plaintiff in the execution, and paying only the amount of his bid, stands in the shoes of his assignor and succeeds to all his rights, but to none other, and the certificate in his hands will be chargeable with all the infirmities which existed against it in the hands of the assignor. *Ibid.* 24.

12. Where the plaintiff in a judgment becomes the purchaser of land, and assigns his certificate of purchase, the assignee will occupy the same position as the assignor did before the transfer. The rule that applies to strangers purchasing at judicial sales, or to a purchaser in good faith and for value from one who has acquired title under a judicial sale, can have no application to such assignee. *Ibid.* 24.

13. *Sale of lands en masse.* A sale of land *en masse*, on execution, when it is susceptible of division, and a smaller portion would, if offered, have satisfied the debt, is irregular. When a needless sacrifice of the debtor's property is made, that circumstance, with inadequacy of price, affords ground for equitable relief. *Ibid.* 24.

14. *Inadequacy of price.* Although gross inadequacy of price alone will not be sufficient to avoid a sale under judicial process, yet it will, when combined with irregularity in making the sale, or

SALES. SALES ON EXECUTION. *Continued.*

even slight circumstances indicating unfairness or fraud, furnish sufficient ground for equitable interposition. *Smith v. Huntoon et al.* 24.

SALE OF GOODS BY AGENT.

15. *Not authorized to collect the price.* See AGENCY, 1, 2.

16. *Unauthorized action of agent—ratification by principal.* Same title, 3, 4.

ON PARTITION.

17. *Sale only after report of commissioners.* See PARTITION, 1.

SANITY AND INSANITY.

PRESUMPTION—QUANTUM OF PROOF. See INSANITY.

SCHOOLS.

GENERAL LAW OF 1872.

1. *Effect upon special acts.* The object in the passage of the School law of 1872 was to establish one general system under which all the schools in the State might be conducted, except where schools were conducted under special acts in cities having less than one hundred thousand inhabitants, or incorporated towns, townships or districts. Such special acts were not repealed or changed by the general law. *Kuenster v. Board of Education*, 165.

CERTIFICATE OF QUALIFICATION.

2. *Whether necessary—in order to teacher's pay.* Section 52 of the School act, which prohibits the paying of any teacher not having a certificate to teach before his employment, out of any school moneys, has application only to those school districts which are acting under the general law. It does not apply to boards of education elected under section 80 of the act. Such boards are expressly authorized to examine teachers, and to fix the amount of their salaries. *Ibid.* 165.

SCIRE FACIAS.

AGAINST CORPORATION. See CORPORATIONS, 3.

SERVICE OF PROCESS.

DEFECTIVE SERVICE.

Cured by appearance. See JURISDICTION, 7.

SPECIAL ASSESSMENTS—SPECIAL TAXATION.

LOCAL IMPROVEMENT.

1. *What to be so considered—who shall determine.* The statute does not define what shall be considered a local improvement. That question is left solely to the determination of the city councils or

SPECIAL ASSESSMENTS—SPECIAL TAXATION.**LOCAL IMPROVEMENT. *Continued.***

village boards. Their decision as to the utility of an improvement upon streets, and whether it is to be treated as a local improvement for the purpose of raising funds by special assessments to pay for it, is final, in the absence of fraud. *Louisville and Nashville Railroad Co. et al. v. City of East St. Louis*, 656.

2. A street improvement may be treated as a local improvement, and paid for by special assessments, although it may not benefit abutting property. A special assessment may be made on property benefited by the improvement, whether it is abutting and contiguous to the improvement or not. The question in every case is, will the property assessed be specially benefited by the proposed improvement. *Ibid.* 656.

VIADUCT IN A PUBLIC STREET.

3. *As a local improvement.* A city council has the power, under section 62, article 5, chapter 24, of the Revised Statutes, to construct a viaduct in a public street by special assessment. *Ibid.* 656.

4. The fact that a viaduct over railway tracks in the street is proposed to be extended across a creek, will not necessarily render a proceeding to build the same by special assessment invalid. In this case, in determining to construct a viaduct in a street over certain railway tracks, it was found impossible to construct such way, with a proper approach, without extending the structure across a creek near by; and it appeared that the cost of a suitable viaduct at that place would not be increased by reason of its extension over the creek. The improvement as so proposed to be made, might well be the basis of a special assessment. *Ibid.* 656.

OF A MERE CONTRACT RIGHT.

5. *Not subject to special assessment.* A mere contract right in one railroad company to run its trains over the track of another company, the right being held subject to being determined upon notice, does not invest the former company with such ownership in the right of way as can be subjected to special assessment. *Ibid.* 656.

DESCRIPTION OF IMPROVEMENT.

6. *By reference in ordinance to plans, etc.* An ordinance for a local public improvement may refer to plans, profiles and specifications attached thereto, for a more full and complete description of the nature, kind and character of the proposed work. *Ibid.* 656.

BENEFITS.

7. *To be assessed against property—not persons.* Property can be assessed for public improvements on the principle of benefits conferred on it,—and not on its owner generally; and it must appear from the proceedings that the assessment is made upon this principle. *Ibid.* 656.

SPECIAL ASSESSMENTS—SPECIAL TAXATION.**BENEFITS. Continued.**

8. *In the case of several parcels—assessment to be several—not in gross.* The statute (Rev. Stat. chap. 24, art. 9, sec. 140,) requires the commissioners, in making their assessment roll, to give a description therein "of each lot, block, tract or parcel of land, and the amount assessed as special benefits thereto." If the benefits are assessed in gross on several tracts or lots, this will invalidate the report, and render the assessment roll liable to objection when offered in evidence. *Louisville and Nashville Railroad Co. et al. v. City of East St. Louis*, 656.

9. Commissioners appointed to assess the benefits to accrue from the construction of a viaduct in a public street, assessed to a railway company "part of blocks 8 and 9, and right of way across Broadway." The blocks consisted of lots. On application to confirm the assessment, the report of the commissioners showing the assessments was offered in evidence, and objected to on the ground the benefits had not been assessed to each of the lots and right of way separately: *Held*, that the objection was well taken. *Ibid.* 656.

SPECIAL TAXATION UPON CONTIGUOUS PROPERTY.

10. *In what cases allowable—conditions to the exercise of the power.* A city council has, by law, the power to widen, extend and further open the crossing of a public street under a railway track, but has no power, by special taxation or otherwise, to provide for the building of a railroad bridge over a street crossing as a local improvement. *City of Bloomington v. Chicago and Alton Railroad Co.* 451.

11. Where the ordinance fails to show any proper case for special taxation of contiguous property, or such ordinance is grossly unreasonable, unjust and oppressive, that may be shown in defense of an application to confirm the levy of special taxes. *Ibid.* 451.

12. An ordinance which requires the widening of a street crossing a railroad under its track, and for the construction of a railroad bridge over the enlarged crossing, to be paid for principally by the railway company's contiguous property specially taxed for that purpose, without any compensation to the company for the burden attempted to be imposed on it, is not only unreasonable, but clearly in excess of the powers conferred on the city council, and void. *Ibid.* 451.

13. An ordinance which shows on its face an attempt to subject property to special taxation to pay for an improvement, which property will in no way be benefited by such improvement, will not justify proceedings for the levy of such taxes. Special taxes for local improvements are justified only on the ground that the subject of the tax receives an equivalent. *Ibid.* 451.

SPECIAL ASSESSMENTS—SPECIAL TAXATION.**SPECIAL TAXATION UPON CONTIGUOUS PROPERTY. *Continued.***

14. Where it is apparent that a local improvement can not benefit contiguous or adjacent property, the levy of special taxes on such property for the purpose of making such improvement can not be sustained. *City of Bloomington v. Chicago and Alton Railroad Co.* 451.

15. The corporate authorities of cities and villages may not arbitrarily provide, by ordinance, that an improvement within their corporate limits shall be treated as a local improvement, to be paid for by special taxation of abutting property, without reference to benefits, without having their action reviewed by the courts. *Ibid.* 451.

PENALTY—FORFEITED LANDS.

16. There is no authority of law for adding twenty-five per cent to special assessments on lands forfeited to the State. Such penalty applies only to the ordinary taxes, and it is error to include such penalty in a judgment against delinquent lands for unpaid special assessments. *Hosmer v. Hunt Drainage District*, 317.

OBJECTIONS TO CONFIRMATION.

17. There is no error in refusing a motion to strike out all of the objections to the confirmation of a special assessment, for irrelevancy, unless none of them present a defense. *City of Bloomington v. Chicago and Alton Railroad Co.* 451.

LIEN OF ASSESSMENT.

18. *Under Drainage law.* See DRAINAGE LAW, 14 to 17.

ST. LOUIS AND SOUTHEASTERN RAILROAD COMPANY.**COUNTY SUBSCRIPTION TO STOCK.**

Act of 1869—constitutionality—title of the act. See STATUTES, 4, 5.

STATE BOARD OF EQUALIZATION. See TAXATION AND TAX TITLES, 6.**STATUTES.****TITLE OF AN ACT.**

1. *In respect of the subject to be expressed therein.* It is not necessary that the title of an act shall express all of the minor divisions of the general subject to which the act relates. It is sufficient if it expresses the general subject of the act, and all the minor subdivisions germane to the general subject will be held to be included in it. But if the title expresses such minor subdivisions which, without such expression, would be held to be included within the general subject, such expression will not render the title obnoxious to the constitutional provision. *Hronek v. The People*, 139.

STATUTES. TITLE OF AN ACT. *Continued.*

2. *Act of 1887, relating to the manufacture, etc., of explosives.* The act entitled "An act to regulate the manufacture, transportation, use and sale of explosives, and to punish an improper use of the same," approved June 16, 1887, is not obnoxious to section 13, article 4, of the constitution, "that no act hereafter passed shall embrace more than one subject, and that shall be expressed in the title." The title does not express two subjects, but only one, and all the provisions of the act are within the subject expressed in the title, and are germane to each other and the general scope and purpose of the act. *Hronek v. The People*, 139.

3. The regulation of the use of explosives necessarily implies the right to punish an improper use. Two different subjects are not included or expressed in or by the title, for the punishment of an improper use flows necessarily from the main or substantive object as stated in the title,—i. e., to regulate the use of explosives. *Ibid.* 139.

4. *Requirements of the constitution of 1848—act of 1869 concerning subscription by counties to stock of St. Louis and Southeastern Railroad Company—diverting subscription from another company.* Section 20 of the act of March 10, 1869, entitled "An act to incorporate the St. Louis and Southeastern Railroad Company," which authorized certain counties through which the road was located, to subscribe to the capital stock of the company all or any part of any sums theretofore voted by the legal voters to another railway company, is void, as being in violation of section 23, article 3, of the constitution of 1848, which provided that "no private or local law which may be passed * * * shall embrace more than one subject, and that shall be expressed in the title." *The People ex rel. Standerfer v. Hamill*, 666.

5. That was a private or local act, and although the subscribing by counties, etc., to the capital stock of the corporation thereby created is germane to the object expressed in the title, the diversion to that corporation of a subscription theretofore authorized by a vote of the people to be made to a different corporation is a wholly different thing. That, it is to be presumed, would affect, adversely, the corporation from which the subscription voted was sought to be diverted, and was, therefore, clearly not germane to the title of the act. *Ibid.* 666.

RULE OF CONSTRUCTION.

6. *Generally.* In construing a statute, the primary consideration is to ascertain and give effect to the legislative intention. In order to accomplish this object, the court should look at the whole act, and seek to ascertain such intention by an examination and comparison of its various provisions. The court may also consider

STATUTES. RULE OF CONSTRUCTION. *Continued.*

other and prior acts relating to the same general subject, and thus ascertain what mischiefs the later legislation was designed to remedy, and the true spirit and import of such legislation. *Soby v. The People*, 66.

7. The courts are not permitted, by the rules of construction, to extend the body of an act by reference to its title, but they may consider the title for the purpose of determining what was within the legislative contemplation. *Ibid.* 66.

8. *How far controlled by State policy.* While the policy of the State indicated by a series of legislation is not of controlling weight in the construction of statutes, it is a matter that may be properly considered in determining the legislative intention in employing words susceptible of two meanings. Other things being equal, that construction will be adopted which comports with such State policy. *Wheeler et al. v. Wheeler et al.* 522.

GENERAL LAW.

9. *As distinguished from local or special legislation.* The fact that an act is applicable only to the conditions existing in a single city in the State will not necessarily render it local or special legislation. A law may be general, and yet be operative in a single place. It is not requisite that it should be presently applicable to every person or to every city within the State. *West Chicago Park Comrs. v. McMullen et al.* 170.

10. *The act of 1879, entitled "An act to enable park commissioners or corporate authorities to take, regulate, control and improve public streets leading to public parks," etc., is not a local or special law, within the constitutional provision prohibiting the passage of local or special laws "incorporating cities, towns and villages, or changing or amending the charter of any town, city or village."* The act applies to all cities where the conditions exist which it is designed to affect. *Ibid.* 170.

REPEAL OF STATUTES.

11. *By substituting new section.* An amendment of a section of a statute by the substitution of a distinct and complete section operates as a repeal of the section so amended. *Louisville and Nashville Railroad Co. et al. v. City of East St. Louis*, 656.

AMENDMENT OF REPEALED STATUTE.

12. *Is void.* A statute purporting to amend a section of a prior act after its repeal, is invalid and abortive. A law not in existence is not the subject of amendment. *Ibid.* 656.

GENERAL SCHOOL LAW.

13. *Does not repeal special acts relating to schools.* See SCHOOLS, 1.

STATUTES. *Continued.*

STATUTES CONSTRUED.

14. *Administration—citation to surrender property.* See ADMINISTRATION OF ESTATES, 9, 10.

15. *Assignment of dower—election by the widow.* See DOWER, 1, 2.

16. *Explosives—act of 1887, relating to their manufacture, etc.* See CRIMINAL LAW, 13, 14.

17. *Bucket shops—gambling in stocks, etc.* Same title, 5 to 11.

18. *Mechanic's lien—sections 28 and 53 of the act.* See LIENS, 3 to 7.

19. *Partition—section 16 of the act—mandatory.* See PARTITION, 1.

20. *Taxing corporations—classifying corporations—rule of uniformity.* The Revenue law construed in *Sterling Gas Co. v. Higby, Collector*, 557. See TAXATION AND TAX TITLES, 1 to 5.

21. *Forfeiture for taxes—penalty.* Same title, 11, 12.

22. *Contest of will—time for instituting suit.* Sec. 7 of the *Statute of Wills*. See WILLS, 19, 20.

STATUTE OF FRAUDS.

PROMISE TO PAY THE DEBT OF ANOTHER.

1. *Promise of stockholder to pay debt of corporation.* A corporation and its stockholders are not one and the same, so that a promise by a stockholder to pay a corporation debt is, in every sense, a promise to pay the debt of another. *Home Nat. Bank of Chicago v. Estate of Waterman*, 461.

STREETS.

LEGISLATIVE CONTROL OVER THEM.

1. A city holds its streets for the public,—not for its citizens only, but the entire public, of which the legislature is the representative; and where no private right is invaded, the legislature may vacate a street or highway, or abridge or limit its use, in its discretion. *West Chicago Park Commissioners v. McMullen et al.* 170.

STREETS LEADING TO PARKS.

2. *Powers of park commissioners.* See PARKS, 1.

STREET RAILWAYS.

EXPULSION OF PASSENGERS. See RAILROADS, 1, 2, 3.

SURETY.

EXTENSION OF TIME TO PRINCIPAL.

1. *Release of surety.* If a creditor, by a valid and binding agreement, without the assent of a surety, gives further time for pay-

SURETY. EXTENSION OF TIME TO PRINCIPAL. Continued.

ment to the principal debtor, the surety will be discharged. *Home Nat. Bank of Chicago v. Estate of Waterman*, 461.

2. *Surety—indemnified—extension of time no release.* A surety who is fully secured by property in his hands is estopped from objecting to any enlargement of the time of payment made by agreement between the creditor and the principal, and is not discharged by such enlargement. The burden of proof is on the creditor to show that the surety or his estate was actually indemnified. *Ibid.* 461.

3. *Death of surety—revokes authority to extend time of payment.* The death of a surety operates as a revocation of the authority of the principal debtor, under an agreement, to make a contract for the extension of the time of payment. *Ibid.* 461.

4. *Extension of time to one of several debtors—operating as a release of the other debtors.* Where two persons are bound for the same debt, and there is an obligation on the part of one to reimburse the other in case of payment being enforced against such other, and this is known to the creditor, then the creditor can not extend the time of payment to the party ultimately liable, without discharging the other debtor, even though such other debtor occupies the position of principal debtor to the creditor. *Ibid.* 461.

SURFACE WATERS.**DOMINANT AND SERVIENT HERITAGE.**

1. The owner of the dominant heritage, or higher tract of land, has the right to have the surface water falling or coming naturally upon his premises, pass off through the natural drains, upon and over the lower or servient lands; and the owner of the dominant heritage may, by ditches or drains, drain his own land into the natural and usual channel, even if the quantity of water thrown upon the servient heritage is thereby increased. *Young v. Comrs. of Highways*, 569.

SERVIENT HERITAGE PROTECTED.

2. *In respect to drainage of highways.* See **HIGHWAYS**, 2, 3, 4.

TAXATION AND TAX TITLES.**AS TO CORPORATIONS.**

1. *Classifying corporations—rule of uniformity—constitutional limitation.* The constitution does not prohibit the legislature from placing certain specified corporations in one class, and providing a uniform method of assessment for that class, and placing certain other specified corporations in another class, and providing a uniform mode of assessment for that class, different from the first class.

TAXATION AND TAX TITLES. AS TO CORPORATIONS. *Continued.*

The rule of uniformity in the constitution applies to the class, and not to all corporations alike. *Sterling Gas Co. v. Higby, Collector*, 557.

2. The fourth clause of section 3 of the Revenue act, as amended in 1879, which provides for the assessment of the capital stock and franchise of a certain class of corporations by the State Board of Equalization, and of other corporations by the local assessors, is not in conflict with section 1, article 9, of the constitution, in its requirement of uniformity. *Ibid.* 557.

3. *Former decisions.* In this case, the rulings in *Coal Run Coal Co. v. Finlen*, 124 Ill. 666, and *Ottawa Gas Light and Coke Co. v. Downey*, 127 id. 201, are brought in review, and adhered to. *Ibid.* 557.

4. *Capital stock and franchise—as corporate property—for purposes of taxation.* Both the capital stock of a private corporation and its franchise are corporate property, for the purposes of assessment and taxation. *Ibid.* 557.

5. The power to impose a tax upon the capital stock and franchise of corporations formed for pecuniary profit is not confined to the first clause of section 1, article 9, of the constitution of 1870. The second clause is not confined to occupations, but also applies to property rights. *Ibid.* 557.

6. *State Board of Equalization—basis of its action in fixing valuations.* The State Board of Equalization is not concluded by the valuation placed upon the property of a corporation by its officers, nor is it essential that it should first hear evidence in fixing the taxable value of property or in changing the valuation returned by the corporation. The board may act upon its own judgment. *Ibid.* 557.

7. *Return by corporation—presumption.* Where a bill seeking to enjoin a tax assessed on the capital stock of a corporation fails to show what return was made by the corporation in respect to its corporate indebtedness, it will be presumed that the return was such as to justify the assessment made. *Ibid.* 557.

MINING RIGHT.

8. *To be listed separately.* Where there is a grant of mineral land, with a reservation of the mining right to the grantor, this will amount to a separation of the rights of property as between the land and mines or mining rights, and each must be listed separately for taxation. *In re Major, Exrx.* 19.

9. Where the ownership of coal is severed from the ownership of the soil, the fee in the coal is property, and, as such, is liable to its just share of taxation. *Ibid.* 19.

TAXATION AND TAX TITLES. *Continued.*

OVER-ASSESSMENT.

10. *Remedy.* On an appeal from the decision of the board of supervisors refusing to abate the taxes on property on the ground of its not being liable to taxation, the regularity of the assessment can not be questioned. A different remedy is provided where the property is assessed too high. *In re Major, Exrz.* 19.

FORFEITURE—PENALTY.

11. *Special assessments—section 129 of the Revenue law construed.* Section 129 of the Revenue law, providing for adding twenty-five per cent to the taxes on forfeited lands, and for the collection thereof, is a penal statute, and should not be held to embrace property not clearly within its terms. It is confined to general taxes, and has no application to special assessments. *Hosmer v. Hunt Drainage District*, 317.

12. There is no authority of law for adding twenty-five per cent to special assessments on lands forfeited to the State. Such penalty applies only to the ordinary taxes, and it is error to include such penalty in a judgment against delinquent lands for unpaid special assessments. *Ibid.* 317.

SPECIAL TAXATION.

13. *For local improvements.* See SPECIAL ASSESSMENTS—SPECIAL TAXATION, 10 to 15.

SPECIAL ASSESSMENTS.

14. *Referable to the taxing power.* See DRAINAGE LAW, 4.

TITLE OF AN ACT. See STATUTES, 1 to 5.

TRUSTS AND TRUSTEES.

MODE OF CREATING A TRUST.

1. *Under section 9 of the Statute of Frauds* a trust must be proved by a writing signed by the party who may create or declare the same, or by a last will in writing. But a bare recital in a will that the testator has conveyed property in trust to persons named is not a devise of such property in trust. *Hunt v. Evans et al.* 496.

WHETHER A TRUST IS CREATED.

2. *And in whose favor.* The owner of certain lands conveyed the same, in parcels, to his sons and sons-in-law, the latter giving their notes in return, for a purchase price, with interest. Only so much of the interest was to be paid as might be needed by the grantor, and the principal not to be collected at all, but the notes to be surrendered to the makers at his death. Subsequently one of the sons-in-law desired the title to the land conveyed to him to be vested in his wife, to which the grantor assented, and in furtherance thereof the grantee mentioned, and his wife, conveyed to a third

TRUSTS AND TRUSTEES. WHETHER A TRUST IS CREATED. *Continued.*

person, who at once executed and acknowledged a deed to the wife, but it was questioned whether that deed had ever been delivered. The original grantor surrendered to this son-in-law the notes he had received from him. On bill filed by the other heirs of the first grantor, it was *held*, that the grantee of the son-in-law mentioned, and his wife, held the title in trust for the latter, and not for the heirs generally. It was not essential to the right of the *cestui que trust* that she should have given her notes in lieu of those which had been surrendered to her husband,—and especially was this true in view of the fact that the original grantor, for whose benefit, alone, the notes could have been required, had died before the bill was filed. *Coffin et al. v. Argo et al.* 276.

MONEY IN HANDS OF AGENT.

3. *Whether held in trust—identity of funds—presumption—breach of trust as a defense.* Money of a principal in the hands of the agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes. While the agent has the money, the agent is not the debtor of the principal, but simply his trustee. *Blair v. Sennott*, 78.

4. In such case, it will be presumed that the money in the hands of the agent is the identical money that he received, and he will not be heard to allege his embezzlement or breach of trust, to escape liability arising from that presumption. *Ibid.* 78.

TRUST FOLLOWING THE PROCEEDS.

5. A person devised her estate to her husband, in trust for their married daughter, to be managed by the trustee during his life. On the foreclosure of a mortgage so devised, the trustee purchased other property, taking a conveyance in his own name, which he afterward conveyed to the daughter. The daughter subsequently sold and conveyed the property, taking the note of the purchaser, which she indorsed, and transferred to the trustee: *Held*, that the trust attached to the note, and that the daughter had no right to receive payment of the note, or control the trustee in its collection. The *cestui que trust* was estopped, by her assignment of the note, to say that the note was not trust property. *Ennor v. Hodson*, 32.

6. In case a debt secured by mortgage on real estate is devised to a trustee in trust for the benefit of another, and on foreclosure other property is bought by the trustee in his own name, such other property will take the place of the debt, and be impressed with the same trust; and where such property is sold and conveyed, the consideration therefor will still be trust property, subject to the right of the trustee to manage and control. *Ibid.* 32.

CONTROL OF TRUST FUND.

7. *Power of cestui que trust.* A testatrix devised all her property to her husband, in trust for her daughter, and appointed the hus-

TRUSTS AND TRUSTEES. CONTROL OF TRUST FUND. *Continued.*

band trustee for the daughter, "to act and transact all her affairs during her natural life." After the death of the testatrix, a note for some of the trust property was given to the daughter, and she indorsed and transferred the same to the trustee for collection, who brought suit thereon: *Held*, that the trustee was given the control of the property during his life, and that the daughter had no right to take the control of the property into her own hands, or to settle the suit brought by the trustee on the note. *Ennor v. Hodson*, 32.

8. Where property is devised to a trustee in trust for a married woman, to be managed by the trustee during his lifetime, she may have the aid of a court of equity to compel a faithful administration of the trust, and, under certain circumstances, to remove the trustee and appoint another in his stead. But she can neither dispose of the property devised in trust for her benefit, nor create a charge upon it, except in the manner and for the purpose specified in the devise. *Ibid.* 32.

RESTRICTIONS UPON A TRUST.

9. *Right of donor.* A testatrix has the right to limit her gift to a married daughter by such restrictions as she may see fit to impose, and a court of equity will not allow them to be set aside by either the voluntary act or the negligent omissions of the trustee appointed to enforce them. *Ibid.* 32.

TRUSTEE DENYING TRUST RELATION.

10. The denial by a trustee of the trust relation is a breach of trust and a flagrant fraud. It is a fraud which taints all his dealings with his *cestui que trust* made at or subsequent to the time of such denial, but it will not affect his prior acts and dealings. *Scanlan et al. v. Scanlan*, 630.

TRUSTEE AND CESTUI QUE TRUST.

11. *Dealings between them.* A trustee can not buy from himself, but may from his *cestui que trust*, if he so deals with him that he shakes off the obligation that attaches to him as trustee. *Ibid.* 630.

ON BILL TO DECLARE A TRUST.

12. *Sale of the trust estate.* On bill to declare the trust upon which a defendant holds land, where no liens are set up or any equitable reasons shown for the sale of the land, it will be error to order its sale. In such case, the power of the court is spent when it declares the uses. *Coffin et al. v. Argo et al.* 278.

TRUST BY DEVISE.

13. *Recitals in will, etc.* See WILLS, 6, 7.

USURY.

RESERVING INTEREST UPON INTEREST.

1. On a loan of \$8000, at the time interest might be reserved at the rate of ten per cent per annum, the borrower gave his four notes to the lender,—one for \$2000, payable in one year; one for \$2500, payable in two years; one for \$2500, payable in three years; and one for \$3275.80, payable four years after date, all calling for ten per cent interest after maturity: *Held*, that the notes, including more than ten per cent simple interest, were usurious. *Drury v. Wolf*, 294.

2. The general rule is, parties can not be bound by any contract made before interest is due, for the payment of compound interest. *Ibid.* 294.

3. But after interest is due, it may, by agreement then made, be added to the principal, and made to thereafter bear interest. *Ibid.* 294.

4. There is, perhaps, an exception to the general rule mentioned, in the case of interest coupons annexed to commercial paper. Such coupons bear interest. But in such case interest is not compounded indefinitely. *Ibid.* 294.

5. There is, therefore, no authority found in this exception for holding that interest may be compounded indefinitely, or at all, in cases where the payment of interest is not secured by some negotiable instrument independent of the instrument whereby the original indebtedness is promised to be paid. *Ibid.* 294.

VARIANCE.

ALLEGATIONS AND PROOFS.

1. *In chancery*. See CHANCERY, 20 to 24.

WAIVER OF OBJECTION.

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3. *Variance*. See SALES, 8, 9.

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Rights and duties of the parties are mutual and concurrent. See CONTRACTS, 8, 9.

VENUE.

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VERDICT.

REQUISITES—CERTAINTY.

1. *As to party convicted*. See CRIMINAL LAW, 32.

VERDICT. Continued.**GENERAL VERDICT.**

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IRREGULARITIES—AFTER VERDICT.

3. *As, on change of venue.* See **CHANGE OF VENUE**, 1.

WAIVER.**QUESTION OF JURISDICTION.**

1. *Waiver of objection.* See **JURISDICTION**, 5, 7.

VARIANCE—ALLEGATIONS AND PROOFS.

2. *Waiver.* See **PRACTICE**, 5.

CHANGE OF VENUE.

3. *Waiver of irregularities.* See **CHANGE OF VENUE**, 1.

WARRANT OF ATTORNEY.**TO CONFESS JUDGMENT.**

- By one partner.* See **PARTNERSHIP**, 1, 2, 3.

WATER-COURSE.**DIVERTING FROM ITS NATURAL CHANNEL.**

1. *Liability for damages resulting.* Where a railway company diverts the flow of a water-course from its natural channel, and conducts it through a ditch to a point where it overflows the land of another, the company will be liable for such damages as result therefrom. *East St. Louis and Carondelet Ry. Co. v. Eisentraut*, 96.

WIDOW.**ELECTION WHETHER TO TAKE UNDER WILL.**

- Renunciation—declaration of acceptance.* See **WILLS**, 15, 16, 17.

WILLS.**RULE OF CONSTRUCTION.**

1. The main object in the construction of a will is to ascertain the intention of the testator as expressed in the instrument, and that intention must prevail, unless it is inconsistent with the rules of law. No clause of a will should be disregarded, but each clause must be considered in connection with the other provisions. *In re Estate of Cashman*, 88.

LIFE ESTATE.

2. *With power of disposition.* As a general rule, where a power of disposal accompanies a devise of a life estate, the power of disposal is only co-extensive with the estate which the devisee takes under the will, and means such disposal as a tenant for life can make, unless the will contains words indicating that a larger power

WILLS. LIFE ESTATE. Continued.

was intended. But a life estate may be created with power to dispose of the fee, and limit a remainder over after the termination of the life estate. *In re Estate of Cashman*, 88.

3. Where money or other property is devised to one for his or her life, and the will provides that "whatever shall remain," or all of the property so devised, or so much thereof "as may remain unexpended," the language will clearly imply a power of disposition by such devisee or life tenant, in his or her discretion. *Ibid.* 88.

4. A testator devised to his wife, for life, eighty acres of land and certain personal property, in lieu of her dower and homestead, with a proviso that she might, at her election, have the land sold with other land and accept in lieu thereof \$3000 in money, "to be accepted and held by her, as above provided in reference to said real estate, during her natural life," and the will then provided, "that after her death all of the said property to her devised and bequeathed (or so much thereof as may remain unexpended) to be converted into money," and the proceeds divided among the testator's children. The widow elected to take the money: *Held*, that she took the \$3000 for life, with the right to its use and control, and its possession, without restriction, and also with the right to expend any part of that sum before her death, and that the use of the word "unexpended," clearly implied the power to expend the money so devised. *Ibid.* 88.

DEVISE OF RENTS AND PROFITS.

5. *Operates as a devise of the land itself.* A devise of the rents, income and profits of land is equivalent to a devise of the land itself. *Zimmer et al. v. Sennott*, 505.

WHETHER A TRUST IS CREATED.

6. A testator devised to his wife as follows: "All the rents, income and profits arising from all my real estate which I may own, (excepting certain specified property,) until the eldest one of my children has attained the age of eighteen years, upon condition that my said wife shall raise, support and educate my children until they respectively have attained the age of eighteen years, after which my wife shall receive one-third, only, of the net rents and income of such real estate, the other two-thirds to be paid to and equally divided among my children by my present wife: *Held*, that the wife took an interest in the land as a devisee, which was liable to sale on execution against her, and that she did not hold such title as trustee for the testator's children. *Ibid.* 505.

7. If the testator had expressed a wish, expectation, hope, desire or request that the devisee should devise the rents, profits and income to the benefit of his children, a trust might have been created in favor of the children. The mere expression of the motive of a

WILLS. WHETHER A TRUST IS CREATED. Continued.

gift or grant is not sufficient to establish a trust. If the raising and education of the children had been required out of the rents and profits, the rule might be different. *Zimmer et al. v. Sennott*, 505.

LEGACY AS A CHARGE.

8. *As a personal charge, and a charge upon the estate.* If a legacy is made a personal charge on the devisee, an acceptance of the devise imposes a personal liability on the devisee, who will take the estate devised as a purchaser and in fee; but if the legacy is charged on the estate devised, the devisee does not take as a purchaser, but as beneficial devisee. *Ibid.* 505.

RECITALS IN A WILL.

9. *As bearing upon the construction of it—misrecital, as to other parts of the will, and as to instruments outside of the will.* Where a will recites that the testator has devised something in another part of the will when in fact he has not done so, such recital will be construed to show a purpose and intention of the testator to devise by the will, and the courts will carry out such intention, and thus give the erroneous recital the effect of a devise by implication. *Hunt v. Evans et al.* 496.

10. But where the recital in the will is to the effect that the testator has, by some instrument other than the will, given to a certain person named in the recital, property, when in fact he has not done so, such erroneous recital will not disclose a purpose and intent to give by the will, and resort must be had to the other instrument, and not to the will. *Ibid.* 496.

11. A testator, after making certain devises, recited in his will that he had conveyed in trust to W. and P., as trustees, certain property, described in the trust deed, for the purpose and upon the trusts mentioned in such deed of trust, reserving the rents, etc., during his life, and upon his death the residue to be vested in a board of directors with intent to establish, under the statute, a public library for the use of the inhabitants of the city of S., upon complying with the directions and trusts named in said deed of trust. The will and deed of trust were both prepared, but the will only was executed: *Held*, that the recital in the will in respect of the creation of a trust could not be construed as a devise of anything, or as a declaration of a trust for the benefit of a public library. *Ibid.* 496.

12. *Disputing recitals—devisees and heirs not estopped.* The devisees and heirs of a testator are not estopped by the recitals in his will that he had conveyed certain property to trustees, in trust for a certain purpose, from denying the execution of any such deed. The rule in *Gorham v. Dodge*, 122 Ill. 528, has no application to such a case. *Ibid.* 496.

WILLS. *Continued.*

SEPARATE INSTRUMENT.

13. *As part of a will.* A will and a conveyance in trust were prepared in blank at the same time, and the will recited the fact of the execution of the deed, in trust, etc. The will alone was executed: *Held*, that the blank deed of trust was not made a part of the will by the recital in the latter. *Hunt v. Evans et al.* 496.

14. One instrument can not be engrafted into another, and become a part thereof, unless the language used manifests an intention that such shall be done. But an instrument not executed or in existence when another is made can not form a part of the latter. *Ibid.* 496.

WIDOW'S RIGHTS AND INTERESTS.

15. *Of her election.* The term "election" implies a choice between different things. It is therefore impossible for a widow to make an election under a will when it gives only that which without it would pass to her by operation of law. *Ward v. Ward et al.* 417.

16. *Declaration of acceptance—by widow—its effect.* Subsequent to the probate of a will, the widow of the testator executed a writing, to the effect that she thereby released and relinquished all her right of homestead, dower and widow's award under the statute, and elected to take the legacy given her by the will: *Held*, that this writing was no conveyance of anything, and, being purely voluntary, could not be enforced. *Ibid.* 417.

17. *Renunciation by the widow—estoppel.* A widow will not be estopped from renouncing the will of her husband when the other devisees do not appear to have been injured by her renunciation, and where she has received nothing under the will that she would not otherwise have taken under the law. *Ibid.* 417.

CONTEST OF WILL.

18. *Limitation—as to time of filing the bill—jurisdictional.* The power of a court of equity to set aside the probate of a will is purely statutory, and the jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. The time limited for the filing of a bill to contest a will is jurisdictional, and if the jurisdictional facts are not alleged, a demurrer will lie. *Wheeler et al. v. Wheeler et al.* 522.

19. *Limitation—saving clause—in respect of "persons absent from the State"—the statute construed.* The saving clause in section 7 of the Statute of Wills, relating to the limitation of the time for contesting wills by bill in chancery, in favor of infants, *femes covert* and persons insane, applies equally to such persons, whether residents or non-residents of this State; but the provision "saving to persons absent from the State," applies to those only who are subject to the jurisdiction of the State, and have gone out of that

WILLS. CONTEST OF WILL. *Continued.*

jurisdiction for temporary purposes. It does not apply to persons who have never been residents of the State. *Wheeler et al. v. Wheeler et al.* 522.

20. *Former decision.* The decision in *White v. Hight*, 1 Scam. 204, extending the saving clause to non-residents, is no longer the rule in this State. *Ibid.* 522.

21. *Testator's knowledge of contents—presumption—degree of evidence.* In the absence of evidence, it will be presumed that a person who executes a will or other instrument does so with a knowledge of its contents; but this is a presumption which will readily yield to evidence tending to show that such was not the fact. *Purdy v. Hall et al.* 298.

22. Where a will has been written, or procured to be written, by a person largely benefited by it, that is a circumstance to excite stricter scrutiny, and require stricter proof of volition and capacity. In such case, the proof must satisfy the court or jury that the testator has not been imposed upon, but knew what he was doing, and the disposition he was making of his property, when he made the will. *Ibid.* 298.

23. *Burden of proof.* On the contest of a will by bill in chancery, the trial is *de novo*, and the burden of proof is primarily upon the proponents of the will, and they are required to show that the will was in writing, and signed by the testator, or by some person in his presence and by his direction, and was attested in his presence by at least two witnesses, and that the testator was of sound mind and memory at the time of signing or acknowledging the same. *Ibid.* 298.

24. The statute makes the certificate of the oaths of the attesting witnesses at the probate, evidence on the hearing upon the bill; and when such evidence is admitted covering the points prescribed by section 2 of the Statute of Wills, it will *prima facie* establish the will, and the burden will then be shifted to the complainants contesting the same. *Ibid.* 298.

25. *Evidence—copy of will.* On the trial of an issue whether an instrument of writing is the last will of a deceased person, it is error for the court to allow the defendants to introduce in evidence a certified copy of the will. The original should be produced, or its absence properly accounted for. *Ibid.* 298.

WITNESSES.

COMPETENCY.

1. *Religious test—abolished.* Section 3, article 2, of the State constitution, has abrogated the rule which obtained prior to 1870, restricting the competency of witnesses on account of defect of

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WITNESSES. COMPETENCY. *Continued.*

religious belief, and there is no longer any test of qualification in respect to religious belief or want of the same which affects the competency of citizens to testify as witnesses in courts of justice. *Hronek v. The People*, 139.

2. *Former decision.* The case of *Central Military Tract Railroad Co. v. Rockafellow*, 17 Ill. 541, on the competency of a witness depending upon his religious belief, overruled *Noble v. The People*, Beecher's Breese, 54; and section 3, article 2, of the constitution, abrogated the former rule that had obtained in this State, and there is now no religious test as to the competency of any witness. *Ibid.* 139.

3. *Stockholder—in behalf of corporation.* In an action under the statute, by the administrator of a deceased person against an incorporated company, to recover for negligence causing the death of the intestate, a stockholder in the company, being interested in the result of the litigation, is incompetent to testify as a witness in behalf of the defendant. *Consolidated Ice Machine Co. et al. v. Keifer*, 481.

CREDIBILITY.

4. *Elements to be considered—detectives—police officers.* On the trial of one for crime, there is no error in refusing an instruction asked by the defense, that the evidence of private detectives and the police "should be received with a large degree of caution." All the circumstances connected with a witness, or that may tend to affect his credibility or bias his judgment, are competent to be shown, and considered by the jury in determining the weight and credit to be given to his testimony. *Hronek v. The People*, 139.

IMPEACHING A WITNESS.

5. *Laying the foundation.* There is no error in refusing proof that a witness offered another witness a sum of money to testify to certain facts after he was informed that the supposed facts were not true, where no proper foundation has been laid in the examination of the witness thus sought to be impeached. *Aneals et al. v. The People*, 401.

6. On the trial of parties for an assault with intent to murder, they called the foreman of the grand jury which found the bill, and asked him if a certain witness for the prosecution did not testify before that body to certain facts, and make statements named. There was no foundation laid for the evidence by calling the witness' attention to the time and place and the facts: *Held*, that the court properly refused the impeaching evidence sought to be given. *Ibid.* 401.

7. It is not proper to call a witness to contradict or impeach another witness in respect of matters occurring out of court, as, by

WITNESSES. IMPEACHING A WITNESS. *Continued.*

showing that the latter had made some statement inconsistent with his testimony, unless the attention of the witness is first called to the time and place of the alleged statement, and he is afforded an opportunity for explanation in respect thereof. *Aneals et al. v. The People*, 401.

8. On proof of the previous character of persons being tried for an assault with intent to murder, some of the witnesses said they had read a charge of poisoning horses by one of the defendants, which was first published after the defendants' arrest. The defendants then offered to prove that such charge was published at the instigation of H., a witness for the prosecution, which the court refused to admit: *Held*, proper, as no foundation had been laid for the evidence by the examination of H. *Ibid.* 401.

9. *Showing the feeling and disposition of witness—as a test of credibility.* Where a witness testifies to a threat made by a defendant against the prosecuting witness, such defendant may be asked whether he and the witness were on friendly or speaking terms, as tending to show the improbability of his having made the threats to such witness. But the refusal to allow such question will not prejudice the defendant, if he is allowed to deny making any such statements to the witness. *Ibid.* 401.

10. *As to matters purely collateral*, when the party calls them out on cross-examination, he is bound by the answer of the witness, but not so in respect of matters relevant and material to the issue being tried. The feeling and disposition of the witness toward the party is, however, relevant and material; and on cross-examination it is competent to test the witness in respect to his feeling, and if he has not done acts or used expressions showing hatred or ill-will toward the party against whom he is testifying, and if he denies the same, to introduce contradictory evidence by way of impeachment. *Ibid.* 401.

11. *Recalling witness—to lay foundation to contradict him.* Ordinarily the court should allow a witness to be recalled for the purpose of laying the foundation to impeach him, by showing his statements out of court; but when the attention of counsel has been called to the rule, and a reasonable limit allowed to put the proper questions to the witness, the refusal of the court to allow the witness to be recalled is within the discretion of the trial court. *Ibid.* 401.

12. *Testimony of witness on another occasion.* In an action to recover for the death of a person, occasioned, as alleged, by negligence in the erection of certain machinery, a witness testified that if a swivel in a hog chain had not been defective a truss would have supported from sixty to a hundred thousand pounds. On cross-examination the witness admitted he testified at the coroner's

WITNESSES. IMPEACHING A WITNESS. *Continued.*

inquest, and when shown the transcript of his evidence as signed by him, he was asked if he did not, on such examination, state that the hog chain, if perfect, would have sustained about thirty tons, to which he answered that he did not recollect. In rebuttal, the court allowed in evidence the deposition of the witness before the coroner showing he did so testify: *Held*, the deposition was properly admitted, by way of impeachment. *Consolidated Ice Machine Co. et al. v. Keifer*, 481.

WRIT OF RESTITUTION.

AFTER DISSOLUTION OF INJUNCTION.

1. After a person who claimed a strip of ground had inclosed the same by a fence, an adverse claimant procured an injunction restraining him from taking possession of the land or erecting the fence thereon, and while the defendant was restrained by the writ the complainant tore down such fence, and included the strip with his adjoining enclosure. It was held proper for the court, in dissolving the injunction, to restore the defendant to possession by a writ of restitution. The court should place the parties *in statu quo*. *Lake Shore and Michigan Southern Ry. Co. v. Taylor*, 603.

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